89- 1485

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

AVERY V. FERRELL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
VALERIE J. SMITH
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(301) 576-6422

Counsel for Petitioner

* *Counsel of Record*

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Where the State has consolidated all charges in a single prosecution and the jury acquits on one charge, but is unable to agree on another charge sharing a common issue of ultimate fact, do the principles of collateral estoppel embodied in the Fifth Amendment's Double Jeopardy Clause bar retrial of the undecided charge?

PARTIES

The caption contains the names of all the parties below.

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Petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court of Appeals of Maryland, *Ferrell v. State*, 318 Md. 235, 567 A.2d 937 (1990), reversing Respondent's convictions, is reproduced in Appendix A (1a-25a).

The reported opinion of the Court of Special Appeals of Maryland, *Ferrell v. State*, 73 Md. App. 627, 536 A.2d 99 (1988), affirming Respondent's convictions, is reproduced in Appendix B (26a-56a).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent's convictions was filed on January 9, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V provides in pertinent part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

STATEMENT OF THE CASE

While standing at a Baltimore City bus stop in the early morning hours of April 10, 1985, three women and a child were robbed by a man brandishing a handgun. The man wore a ski mask and a three-quarter length gray coat. He took the women's purses and the child's school bag. (E.210-219, 239-245, 247-263).[1] He prevented one woman's escape by firing the handgun in her direction. (E.219, 244, 259). Another woman, who followed the robber as he fled, saw him run into an apartment complex on Swann Avenue, stripping off his outer clothing as he ran. (E.219-223).

Baltimore City police responded a few minutes later and began searching the area of the apartment complex, which was located about a block from the bus stop. (E.92-97, 264-268). Officer Wagner saw Respondent Avery V. Ferrell emerge from one of the buildings. Ferrell was wearing a suit; Wagner ob-

[1] References to the record herein are to the Joint Record Extract filed in the Court of Appeals of Maryland.

served that he carried a shopping bag in his hand and a gray coat on his arm. (E.268-271). Ferrell quickly walked away when he saw Wagner. Ferrell then dropped the bag and ran behind an apartment building. (E.272-276). Ferrell soon reappeared and entered the apartment building located at 400 Swann Avenue. (E.99-101, 277). Officer Brown followed and stopped Ferrell as he was about to enter a first floor apartment. (E.99-101).

A search of the shopping bag disclosed the victims' purses, a ski mask, a glove, and a handgun containing one spent cartridge and five live rounds. At the bottom of the bag were papers belonging to Ferrell. (E.104, 273-280). The victims, who had been transported to Ferrell's location, were unable to identify Ferrell as the masked robber. Several of them, however, did identify Ferrell's gray coat as looking like the one worn by the robber. (E.102-104, 216-218, 247-249, 281).

Four criminal informations—one for each victim—were filed, each charging Ferrell with eight counts, including robbery with a deadly weapon, use of a handgun in the commission of a crime of violence, assault with intent to rob, and lesser offenses. The State consolidated all the charging documents for trial. In November of 1985, Ferrell was convicted on six counts in each information, but was later granted a new trial. At a retrial in June of 1986, the jury hung on all counts and a mistrial was declared. (28a).

At a third trial in August, 1986, the State pressed only robbery with a deadly weapon (four counts, one for each victim) and use of a handgun in the commission of a crime of violence (one count). This time the jury acquitted Ferrell on the handgun count, but

was unable to agree on the counts charging robbery with a deadly weapon. (E.567-570; 29a, 31a-32a).

Prior to the commencement of retrial in November, 1986, Ferrell moved to dismiss the robbery counts on grounds of double jeopardy and collateral estoppel. He argued that the only disputed issue at the third trial was his criminal agency, and that the court was required to find that the third jury's acquittal on the handgun count resulted in implicit acquittals on the robbery counts that the third jury was unable to decide. The trial court denied the motion. (E.2-21).

Ferrell was retried and convicted on four counts of armed robbery. He reasserted the collateral estoppel claim on appeal before the Court of Special Appeals of Maryland. That court affirmed Ferrell's convictions, applying the rational basis test of collateral estoppel as enunciated by this Court in *Ashe v. Swenson*, 397 U.S. 436 (1970). (32a-34a).[2]

Reviewing the case on certiorari, the Court of Appeals of Maryland reversed, holding that retrial on the mistried counts violated Ferrell's rights under the Fifth Amendment. (5a-23a).[3] The court rejected the

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[2] In reaching its decision, the Court of Special Appeals noted that Ferrell failed to provide a transcript of the third trial as required for a proper application of the rational basis test, and concluded that this omission rendered it difficult to conduct the analysis urged by Ferrell. (33a-34a). Because the State of Maryland requests this Court to review only the question whether the collateral estoppel principles of the Fifth Amendment should *ever* apply in cases not involving seriatim prosecutions, the absence of a complete transcript of the third trial is immaterial.

[3] Although the Court of Appeals noted that collateral estoppel as embodied in the double jeopardy prohibition is an aspect of

State's argument that collateral estoppel was inapplicable outside the context of seriatim prosecutions and was never intended to preclude retrial of counts a jury could not decide when the same jury acquitted the defendant on another count involving the same issue of ultimate fact. (13a-23a). It also rejected the State's argument that a rational basis for the jury's action existed. (5a-13a). The dissenting judge found it "absolutely illogical" to utilize the doctrine of collateral estoppel to conclude the third jury found Ferrell was not the robber. Had it so found, he pointed out, the jury would have acquitted Ferrell of armed robbery, just as it had acquitted him on the handgun counts. (23a-25a).

REASONS FOR GRANTING THE WRIT

I. The *Ferrell* Decision Misapplies the Collateral Estoppel Principles of *Ashe v. Swenson*, Conflicts with Related Decisions of this Court, and Produces the Arbitrary Result of an Implied Acquittal when the Jury Refused to Acquit.

In *Ashe v. Swenson*, this Court first held that the federal rule of law known as collateral estoppel is embodied in the Fifth Amendment prohibition against

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both the Fifth Amendment of the United States Constitution and Maryland's common law, and its opinion occasionally makes reference to state court decisions, it is clear that the court believed federal law—in particular *Ashe v. Swenson*—compelled its conclusion. At no point in its decision did the court indicate that Maryland law provided Ferrell with rights distinct from, or broader than, those of the Fifth Amendment. Accordingly, the Maryland high court's decision does not rest on an adequate and independent state ground. *Kentucky v. Stincer*, 482 U.S. 730, 735 n.7 (1987).

double jeopardy.[4] The primary purpose of *Ashe* was to protect a defendant from the government's strategic parcelling of multiple counts arising from a single criminal transaction into separate, sequential prosecutions, in order that it might hone or strengthen its evidence, spread its risk among several juries, or just wear down the defendant. The seriatim prosecutions that occurred in *Ashe* allowed a realistic and rational application of the rule of collateral estoppel, which, as there re-defined, "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in *any future lawsuit*." 397 U.S. at 443 (emphasis supplied). Because the only question before the first jury in that case was Ashe's participation in a robbery, and because that jury had unanimously acquitted Ashe on all counts, this Court could confidently conclude that the jury had unanimously decided that Ashe had not robbed either the victim at issue in the first case or any other person who was in the company of that victim. *Id.* at 444-46.

The contextual underpinnings of the collateral estoppel rule—a strategic seriatim prosecution of counts and the presentation of facts from which a reviewing court can confidently conclude what, if any, ultimate facts were fully and finally litigated in the first lawsuit—were fundamental to *Ashe*'s purpose, its fairness, and its practical applicability. This cannot be doubted in view of the more recent pronouncement

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[4] When *Ashe* was decided, collateral estoppel had been a rule of federal criminal law for some years. *See Sealfon v. United States*, 332 U.S. 575 (1948); *United States v. Oppenheimer*, 242 U.S. 85 (1916).

of now Chief Justice Rehnquist for a majority of this Court in *Ohio v. Johnson*, 467 U.S. 493, 500 n.9 (1984), that "where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." Applied outside of that factual context, the collateral estoppel doctrine clashes head-on with established Fifth Amendment law allowing retrial after mistrial and the inconsistent resolution of counts by a jury in the same case. It ceases to protect the defendant and instead produces the irrational result of undeserved acquittals. The Court of Appeals' decision in this case, which illustrates these very problems, provides the Court with the opportunity to answer the question left open in *Ashe*, and over which dispute has been generated in the state and federal courts: Should a jury's determination of one count be allowed to collaterally estop continued prosecution of a mistried count in the same case?

Consistent with the goal of *Ashe*, the State of Maryland consolidated all counts against Ferrell into a single prosecution and tried them together. It made no attempt to harass Ferrell or increase its chances to convict him through separate indictments or a sequential prosecution of the charges. The jury chose to acquit Ferrell of the handgun count, but refused to acquit or convict him of the robbery counts. Ignoring *Ashe*'s contextual underpinnings, the Court of Appeals of Maryland held that collateral estoppel precluded retrying Ferrell on the undecided charges.

The *Ferrell* court's extension of the doctrine of collateral estoppel to these facts directly conflicts with the State's right under this Court's decisions since

United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824), to retry counts following a mistrial resulting from jury deadlock. *See Richardson v. United States*, 468 U.S. 317, 324 (1984); *Arizona v. Washington*, 434 U.S. 497, 509 (1978). *Richardson* clearly reaffirmed the maxim that jeopardy on a mistried count does not terminate, but rather continues through retrial, 468 U.S. at 325-26, and that the government's right to " 'one complete opportunity to convict those who have violated its laws' " means the defendant may be retried on mistried counts until resolution of the case by a verdict from a jury, *id.* at 324-26, *quoting Arizona v. Washington*, 434 U.S. at 509. The Maryland court's finding of an acquittal on the mistried counts prior to verdict is the type of appellate intervention condemned in *Richardson*.

Further, this Court has never retreated from the view that juries may legitimately act through compromise, lenity, or mistake, and that any resulting inconsistent resolution of charges is insulated from attack on the basis of collateral estoppel or other constitutional grounds. *See Dowling v. United States*, 493 U.S. ___, 110 S.Ct. 668 (1990); *United States v. Powell*, 469 U.S. 57 (1984); *Standefer v. United States*, 447 U.S. 10 (1980); *United States v. Dotterweich*, 320 U.S. 277 (1943); *Dunn v. United States*, 284 U.S. 390 (1932). This is so because when it is known "the same jury reached inconsistent results[,] . . . principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful." *United States v. Powell*, 469 U.S. at 68. The *Ferrell* decision cannot be reconciled with these broad principles. Thus, review of the instant case will permit

this Court to harmonize the doctrine of collateral estoppel with the related concepts of retrial after mistrial and jury compromise.

For yet another reason, this Court should review the decision of the Court of Appeals of Maryland. As this case aptly demonstrates, application of *Ashe* outside its factual context is irrational. It was substantially certain that the jury in *Ashe* decided that the defendant there was not a criminal agent in the robbery of any of the victims. Here, just the opposite is true. It is substantially certain the jury did *not* decide the issue of criminal agency in the armed robberies in Ferrell's favor. If it had, it would have acquitted him. Yet, the Maryland court holds that the rational basis test of collateral estoppel be irrationally applied to ignore the jury's consideration and rejection of an acquittal.

The *Ferrell* court's application of the *Ashe* doctrine thus ignores the directions of this Court that collateral estoppel be applied with "realism." *Ashe v. Swenson*, 397 U.S. at 444. Why should Ferrell be entitled to a presumption of juror rationality where, unlike the *Ashe* situation, the court knows the jury acted inconsistently? How can it be unfair to recognize the fact that the jury did not acquit the defendant? How can it be fair to the government to presume the jury did that which it did not do? Judge McAuliffe, dissenting below, aptly points out the illogic of such a rule. (23a-25a). As here applied, collateral estoppel is arbitrary and effects a serendipitous windfall acquittal for Ferrell.

II. A Conflict among the State and Federal Courts Exists on the Applicability of Collateral Estoppel Outside the Context of Seriatim Prosecutions.

Because juries frequently render verdicts like that rendered by Ferrell's third jury, the lower state and federal courts have repeatedly been presented with the same collateral estoppel question that was addressed by the Maryland Court of Appeals. Like the majority and dissenting opinions in this case, the lower court decisions sharply diverge on the issue whether and why collateral estoppel should apply. Two early precedents that blindly apply collateral estoppel in this factual context without explanation are *United States v. Kenney*, 236 F.2d 128, 129-30 (3d Cir.), *cert. denied*, 352 U.S. 894 (1956), and *Cosgrove v. United States*, 224 F.2d 146, 150 (9th Cir. 1954). These decisions have been the basis for later cases applying collateral estoppel in this context. *See United States v. Mespoulede*, 597 F.2d 329, 336 (2d Cir. 1979); *United State v. Flowers*, 255 F.Supp. 485, 488 (E.D.N.C. 1966). *Accord United States v. Gornto*, 792 F.2d 1028, 1029-36 (11th Cir. 1986); *United States v. Larkin*, 605 F.2d 1360, 1369-70 (5th Cir. 1979), *modified on other grounds*, 611 F.2d 585 (5th Cir.), *cert. denied*, 446 U.S. 939 (1980); *United States ex rel. Triano v. Superior Court*, 393 F.Supp. 1061, 1067-68 (D. N.J.), *aff'd*, 523 F.2d 1052 (3d Cir. 1975), *cert. denied*, 423 U.S. 1056 (1976).

Other courts have said that collateral estoppel is inapplicable when a single jury acquits on some counts and is unable to reach a verdict on other counts involving a common issue of fact. *See United States v. McGowan*, 385 F.Supp. 956, 959-61 (D. N.J. 1974);

United States v. Smith, 337 A.2d 499, 501-03 (D.C. 1975); *Petitions of Shotwell*, 4 Kan. App. 2d 382, 607 P.2d 83, 87-88 (1980); *State v. Dominique*, 619 S.W.2d 782, 786 (Mo. Ct. App. 1981) (dictum); *State v. Esposito*, 148 N.J. Super. 102, 371 A.2d 1273, 1275-76 (1977), relying in part on *State v. Roller*, 29 N.J. 339, 149 A.2d 238, 241-44 (1959); *State v. Triano*, 147 N.J. Super. 474, 371 A.2d 734, 734-35 (1974).[5]

Finally, some federal courts, though applying the doctrine of collateral estoppel, have criticized and questioned the propriety of doing so when a jury returns acquittals on some counts, but is unable to decide others. *See United States v. Mulherin*, 529 F.Supp. 916, 931-39 (S.D. Ga. 1981), *aff'd*, 710 F.2d 731 (11th Cir.), *cert. denied*, 464 U.S. 964 (1983), *cert. denied*, 465 U.S. 1034 (1984) (court could not ignore indication that there was not a failure of proof on undecided counts; the complexity of mixed verdicts on multicount indictments reveals impracticality, if not infeasibility of use of rational basis test in this situation); *United States v. Davis*, 369 F.2d 775, 780 (4th Cir. 1966), *cert. denied*, 386 U.S. 909 (1967) (need to invoke protections of collateral estoppel in this situation, if it exists at all, less compelling than in successive prosecutions); *United States v. Flowers*, 255 F.Supp. at 488-89 (application of collateral estoppel in this context irrational and less sound than recognizing reality of jury inconsistency).[6]

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[5] Interestingly, the *Esposito* and *Triano* decisions from New Jersey conflict with the position taken by the United States District Court for the District of New Jersey in *United States ex rel. Triano*, which is in turn inconsistent with the same federal court's decision in *McGowan*.

[6] The controversy has generated conflicts on another issue.

These conflicting interpretations of the collateral estoppel rule demonstrate the need for this Court to resolve an important and recurring constitutional question. This case presents that opportunity.

CONCLUSION

Because the State of Maryland here "made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the application of collateral estoppel are inapplicable." *Ohio v. Johnson*, 467 U.S. at 500 n.9. By detaching the *Ashe* rule from its factual moorings and extending it to apply to multiple counts in a single prosecution, the Maryland Court of Appeals has given Ferrell the benefit of acquittals even though Ferrell's jury clearly did not do so. This application of *Ashe* beyond its contextual limits transforms the collateral estoppel principles embodied in the Double Jeopardy Clause from a shield to a sword the defendant may use to block retrial upon a charge for which jeopardy never

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The Maryland court and others broadly construe *Ashe* to mean that a second jury may never decide an issue inconsistently with a prior jury's factual finding, even where all counts are joined in a single prosecution. Under that theory, if a defendant is convicted of one count and inconsistently acquitted on another, retrial following a reversal of the conviction for trial error might be barred. Not surprisingly, courts have come to different conclusions on whether *Ashe* precludes retrial in this situation also. *See, e.g., United States v. Venable*, 585 F.2d 71, 75-77 (3d Cir. 1978); *United States v. Nelson*, 574 F.2d 277, 283 (5th Cir.), *cert. denied*, 439 U.S. 956 (1978); *DeSacia v. State*, 469 P.2d 369, 378-81 (Alaska 1970). Disallowing retrial of an inconsistent conviction arising from sufficient evidence, simply because the defendant has proven a trial error on appeal, illustrates the absurdity of extending *Ashe* outside the context of sequential prosecutions.

terminated, and of which he was never exonerated, a result not intended by this Court. By correcting the *Ferrell* court's error, this Court can right that aberrant result, clarify for the state and federal courts the limits of collateral estoppel's application under the Fifth Amendment, and advance society's interest in giving the government a complete opportunity to prosecute its criminal offenders.

Respectfully submitted,

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

GARY E. BAIR*
VALERIE J. SMITH
Assistant Attorneys General

200 Saint Paul Place
Baltimore, Maryland 21202
(301) 576-6422

Counsel for Petitioner

* *Counsel of Record*

March 12, 1990

APPENDIX

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APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 13
September Term, 1988

AVERY V. FERRELL

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
***Blackwell,**

JJ.

Opinion by Eldridge, J.
McAuliffe, J., dissents

Filed: January 9, 1990

This criminal case involves the applicability of the doctrine of collateral estoppel where a defendant was acquit-

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* Blackwell, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

ted on one count of a two-count charging document, where the jury was unable to agree on the other count, where the disputed issue under both counts was the same, and where the defendant was subsequently retried for the offense on which the jury had previously been unable to agree.

The pertinent facts, as disclosed by the prosecution's evidence, are as follows. On the morning of April 10, 1985, three women and a school girl were robbed at gunpoint by a lone man carrying a handgun and wearing a ski mask, a blue hooded sweatshirt, a long gray coat and tennis shoes. During the course of the robbery, one of the victims attempted to flee the scene at which time the robber fired a shot from the handgun and grabbed the fleeing victim's pocketbook. As the robber fled the scene, he was followed a short distance by one of the victims who later testified that she observed the robber changing clothes as he was running away.

The police were called, arrived on the scene immediately, and began searching for the robber in a nearby apartment development. One of the officers testified that he observed the defendant, Avery Ferrell, emerging from an apartment building wearing a blue-gray suit, hard shoes, and carrying a gray coat and a shopping bag. As the officer approached him, Ferrell began to walk away at an increasingly brisk pace. According to the officer's testimony, Ferrell dropped the shopping bag and ran behind a building. The officer then observed Ferrell entering a different apartment building and relayed that information to another officer at the scene who arrested Ferrell.[1] When Ferrell was apprehended, he was carrying a three-quarter length gray coat which was identified by one of the victims as looking like the coat the robber wore. None of the

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[1] The police officer's testimony concerning the defendant's movements and possession of the shopping bag was directly contradicted by the defendant's testimony.

victims, however, was able to identify Ferrell as the masked robber. The shopping bag was recovered and found to contain the articles stolen from the victims, along with a handgun containing five live rounds with one spent cartridge, and a ski mask.

The State's Attorney filed four criminal informations against Ferrell, each relating to one of the victims, and each charging the following offenses:

Count 1 - Robbery with a deadly weapon;
Count 2 - Attempted robbery with a deadly weapon;
Count 3 - Robbery;
Count 4 - Assault with intent to rob;
Count 5 - Assault;
Count 6 - Theft of less than $300;
Count 7 - Use of a handgun in the commission of a felony or crime of violence;
Count 8 - Unlawful carrying of a handgun.

A fifth information charged Ferrell with assault with intent to murder one of the victims.

Ferrell has since stood trial four times in the Circuit Court for Baltimore City. At the first trial on the above-described charges, the jury returned a verdict of not guilty of assault with intent to murder and guilty of the other charges except counts 2 and 4.[2] Ferrell moved for a new trial, and the motion was granted.[3] The second trial resulted in a hung jury on all charges submitted to the jury. At the third trial, the State desired that only the charges of armed robbery and use of a handgun in the commission of a felony or crime of violence would be submitted to the jury. The jury found Ferrell not guilty of using a handgun

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[2] It is not clear from the record what happened to counts 2 and 4.

[3] The new trial was apparently granted on the ground that the jury's verdicts were not unanimous.

in the commission of a felony or crime of violence, but the jury was unable to reach a verdict as to armed robbery. Once again a mistrial was declared.

The State decided to bring Ferrell to trial a fourth time for armed robbery. Prior to the fourth trial, Ferrell moved to have the armed robbery counts dismissed on the grounds of collateral estoppel and double jeopardy. Ferrell argued that, as the only issue before the jury at the third trial on both the handgun counts and the armed robbery counts was the identity of the robber, his acquittal on the handgun charges necessarily determined the identity issue in his favor, thus precluding the State from relitigating that issue. The trial judge denied the motion. While finding that only one person was accused of robbery with a handgun, and that the disputed issue at the third trial was whether the defendant was that person, the trial judge took the position that the jury's acquittal on the handgun charges could have been based on some theory other than a determination that the defendant was not the armed robber. At one point the trial judge stated: "How do you know they [the jurors] didn't feel that the gun wasn't used in the robbery, even though there was a gun? I mean, I can't speculate on what the jury determined."

The trial proceeded, and Ferrell was convicted. He was given two fifteen year sentences on two of the armed robbery counts, to be served concurrently, and two ten year sentences on the two remaining counts, to be served consecutively to the fifteen year term and consecutively to each other, for a total of thirty-five years imprisonment.

On appeal to the Court of Special Appeals, Ferrell challenged the convictions on the grounds, *inter alia*, of collateral estoppel and judicial misconduct. The Court of Special Appeals, by a divided court, affirmed. *Ferrell v. State*, 73 Md. App. 627, 536 A.2d 99 (1988). The intermediate appellate court held that the jury could have grounded its acquittal of the handgun charges on an issue

other than the disputed issue under the armed robbery charges. Unlike the trial court, however, which had based its decision on the possibility that the jury's acquittal on the handgun charges rested on a theory not supported by the evidence, the Court of Special Appeals held that the jury at the third trial could have found from the evidence that the defendant was an accomplice in the robbery rather than the actual robber who used the handgun. The Court of Special Appeals also held that the conduct of the circuit court did not amount to reversible error.

We granted Ferrell's petition for a writ of certiorari to determine whether the Court of Special Appeals erred in concluding that collateral estoppel did not preclude a retrial on the armed robbery counts and whether the circuit court's conduct constituted reversible error. Since we shall resolve the collateral estoppel issue in Ferrell's favor, we shall not reach the second issue.

I.

Both the Fifth Amendment to the United States Constitution and Maryland common law provide that no person shall be put in jeopardy twice for the same offense. Moreover, under both the Fifth Amendment and Maryland common law, it is established that the doctrine of collateral estoppel is embodied in the double jeopardy prohibition. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970); *Robinson v. State*, 307 Md. 738, 741-743, 517 A.2d 94 (1986); *Bowling v. State*, 298 Md. 396, 401-402, 470 A.2d 797 (1984); *Carbaugh v. State*, 294 Md. 323, 329, 449 A.2d 1153 (1982); *Powers v. State*, 285 Md. 269, 401 A.2d 1031, *cert. denied*, 444 U.S. 937, 100 S.Ct. 288, 62 L.Ed.2d 197 (1979); *Cousins v. State*, 277 Md. 383, 398, 354 A.2d 825, *cert. denied*, 429 U.S. 1027, 97 S.Ct. 652, 50 L.Ed.2d 631 (1976). *See also In re Neil C.*, 308 Md. 591, 594, 521 A.2d 329 (1987).

In *Ashe v. Swenson*, *supra*, the defendant was charged with the robbery of one of six poker players who had been

robbed by three or four armed men. The only contested issue in the case was whether the defendant was one of the robbers. At the end of the trial, the jury found the defendant not guilty. Six weeks later, the defendant was brought to trial and convicted for the robbery of one of the other poker players. The United States Supreme Court reversed the conviction, stating: " 'Collateral estoppel' is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." 397 U.S. at 443, 90 S.Ct. at 1194.

The Supreme Court has applied the collateral estoppel holding of *Ashe v. Swenson* in several subsequent cases. *See, e.g., Turner v. Arkansas*, 407 U.S. 366, 92 S.Ct. 2096, 32 L.Ed.2d 798 (1972); *Harris v. Washington*, 404 U.S. 55, 92 S.Ct. 183, 30 L.Ed.2d 212 (1971); *Simpson v. Florida*, 403 U.S. 384, 91 S.Ct. 1801, 29 L.Ed.2d 549 (1971). *See also United States v. Powell*, 469 U.S. 57, 64, 105 S.Ct. 471, 476, 83 L.Ed.2d 461 (1984).

In *Powers v. State*, *supra*, 285 Md. 269, 401 A.2d 1031, this Court applied the principles of *Ashe v. Swenson* and its progeny to circumstances similar to those in the case at bar. In *Powers*, the defendant was charged with the armed robbery of two victims, and the attempted armed robbery of a third victim, all at the same time and place. Unlike the facts of *Ashe v. Swenson*, all of the charges against Powers were tried at a single trial. A jury acquitted Powers of charges relating to two of the victims but could not agree on the charge relating to the third victim. When the State decided to retry *Powers* on the armed robbery charge relating to the third victim, Powers filed a motion to dismiss on the ground of collateral estoppel. The trial court denied the motion, but this Court reversed.

The Court in *Powers* held "that the doctrine of collateral estoppel applies after a jury, at a single trial, acquits on one count of a multicount indictment and is unable to agree upon a verdict on a related count of the same indictment involving a common issue of ultimate fact, which if found in favor of an accused would establish his innocence on both counts." 285 Md. at 288, 401 A.2d at 1042. We reasoned that, even though under Maryland common law a mistrial is equivalent to no trial at all, is not a final determination, and resolves no issue, *Cook v. State*, 281 Md. 665, 671, 381 A.2d 671, 674, *cert. denied*, 439 U.S. 839, 99 S.Ct. 126, 58 L.Ed.2d 136 (1978), we could not ignore the fact that in the same trial a final determination of the common issue of ultimate fact had indeed been made on a related count and had been decided in the defendant's favor. The Court stated that "the primary purpose of the doctrine of collateral estoppel is to protect an accused from the unfairness of being required to relitigate an issue which has once been determined in his favor by a verdict of acquittal." 285 Md. at 283-284, 401 A.2d at 1039.

The only disputed issue before the jury in *Powers* was whether Powers had been one of the robbers. By its verdicts of acquittal, the jury found that Powers had not been one of the robbers. Therefore, the State was precluded from bringing a second prosecution on the count on which the jury could not agree.

There is a difference between *Powers* and the instant case. *Powers* involved separate victims and essentially identical offenses, with the retrial concerning the same offense but a different victim than the ones to whom the earlier acquittals related. The case at bar involves separate victims and offenses which are separate but deemed the same under the required evidence test, and the retrial relates to the same victims but a different offense than that which was the subject of the acquittal at the earlier trial.[4] Never-

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[4] *See State v. Ferrell*, 313 Md. 291, 297-301, 545 A.2d 653, 656-658

theless, the critical questions in applying collateral estoppel are not whether the victim is the same or whether each offense is the same. The important questions are whether the offense for which the defendant was earlier acquitted, and the offense for which he is being retried, each involved a common issue of ultimate fact, and whether that issue was resolved in the defendant's favor at the earlier trial. As Judge Adkins recently stated for the Court in *Robinson v. State*, *supra*, 307 Md. at 742, 517 A.2d at 96, "the language . . . from [*Ashe v. Swenson*] makes it clear that the critical consideration is whether 'an issue of ultimate fact' has been determined in favor of a defendant. The process by which that determination is made . . . is not critical." *See, e.g., Turner v. Arkansas*, *supra*, 407 U.S. at 367-370, 92 S.Ct. 2098-2099 (collateral estoppel precluded trial on robbery charge where defendant, at earlier trial, had been acquitted of murdering same victim, and where issue of ultimate fact was the same). *See also Bowling v. State*, *supra*, 298 Md. at 402-405, 470 A.2d at 800-802. Moreover, courts applying collateral estoppel where a jury acquits on one count of a multicount indictment but is deadlocked on another count have made no distinction between situations where the two offenses are the same and those where the two offenses are different. The doctrine is applied regardless. If the court decides that an issue has been determined in a defendant's favor, then collateral estoppel will preclude the prosecution from relitigating that issue. *See, e.g., United States v. Gornto*, 792 F.2d 1028, 1031 (11th Cir. 1986); *United States v. Larkin*, 605 F.2d 1360, 1370-1371 (5th Cir. 1979), *modified on other*

(1988), holding that armed robbery is a lesser included offense of the use of a handgun in the commission of a felony or crime of violence when that felony or crime of violence was the same armed robbery. It is noteworthy that if the jury at the defendant's third trial had acquitted the defendant of the armed robbery charges, and had been hung on the handgun charges, a retrial on the handgun charges would have been precluded by double jeopardy principles. *See Wright v. State*, 307 Md. 552, 562, 515 A.2d 1157 (1986).

grounds, 611 F.2d 585 (5th Cir. 1980), *cert. denied*, 446 U.S. 939, 100 S.Ct. 2160, 64 L.Ed.2d 793 (1980); *United States v. Mespoulede*, 597 F.2d 329, 336-337 (2d Cir. 1979); *United States v. Hans*, 548 F.Supp. 1119, 1124 (S.D. Ohio 1982); *United States v. Flowers*, 255 F.Supp. 485 (E.D.N.C. 1966).

As previously mentioned, the trial judge, although finding that the only issue at the third trial in this case was the identity of the lone robber who used an operative handgun, nevertheless speculated that the jury's acquittal on the handgun charge could have been based on some theory conjured up by the jury and having nothing to do with the identity of the armed robber. The Court of Special Appeals, on the other hand, purported to find some indication in the record that the jury at the third trial might have grounded its verdict on a finding that the defendant was an accomplice in the robbery as opposed to being the actual robber. Neither the trial court's nor the Court of Special Appeals' position is tenable in light of the case law and the record here.

In *Ashe v. Swenson*, *supra*, the Supreme Court stated that the "decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." 397 U.S. at 444, 90 S.Ct. at 1194. "[T]his approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' " *Ibid.* In *Simpson v. Florida*, *supra*, 403 U.S. at 385, 91 S.Ct. at 1802, the Court indicated that collateral estoppel precluded a retrial following an acquittal where the "sole disputed issue at each of [petitioner's] trials" was the same, namely petitioner's identity as a perpetrator of the armed robbery. *See Turner v. Arkansas*, *supra*, 407 U.S. at 368-

369, 92 S.Ct. at 2098-2099 (Court reviewed trial record, including jury instructions, in determining that issue at the two trials was the same); *Sealfon v. United States*, 332 U.S. 575, 580, 68 S.Ct. 237, 240, 92 L.Ed. 180 (1948) (Court reviewed evidence and prosecution's theory at first trial, in determining that acquittal on a conspiracy charge precluded subsequent prosecution for substantive offense); *Bowling v. State*, *supra*, 298 Md. at 402-403, 470 A.2d at 800-801.

Consequently, in determining whether the State at a subsequent trial is attempting to relitigate an issue which was resolved in the defendant's favor at an earlier trial, a court must realistically look at the record of the earlier trial, including the pleadings, the evidence, the prosecution's theory, the disputed issues, and the jury instructions. A court should not, as did the trial court in the instant case, ignore the evidence and disputed issues at the earlier trial and speculate that the jury's acquittal might have been based on a theory having nothing to do with the evidence and issues presented to the jury.

Moreover, in reviewing the earlier trial to determine the jury's basis for the acquittal, a court "should not strain to dream up hypertechnical and unrealistic grounds on which the previous verdict might conceivably have rested." *United States v. Jacobson*, 547 F.2d 21, 23 (2d Cir. 1976), *cert. denied*, 430 U.S. 946, 97 S.Ct. 1581, 51 L.Ed.2d 793 (1977). *See also United States v. Mespoulede*, *supra*, 597 F.2d at 333. " '[U]nrealistic and artificial speculation about some far-fetched theory upon which the jury might have based its verdict of acquittal' is foreclosed." *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984), quoting *United States v. Sousley*, 453 F.Supp. 754, 762 (W.D. Mo. 1978).

The record in this case is devoid of any indication that the jury at the third trial could have rationally based its acquittal on the handgun charges upon the accomplice the-

ory suggested by the Court of Special Appeals or upon any issue other than the identity of the lone robber. Nowhere in the evidence is there a suggestion of an accomplice. Indeed, the State throughout all of the trials established that there was only one robber.[5] All testimony and other evidence put on by the State were designed to convince the jury that the defendant Ferrell was the man who robbed the four victims with a handgun and fired the gun at one of the victims. The only theory posited throughout was that there had been one gun and one robber, and that Ferrell was the robber. In fact, the State's attorney said in his closing argument at the fourth trial that there is no dispute as to whether an armed robbery took place. "The dispute . . . becomes whether or not this defendant Avery Vincent Ferrell was the young man who on that morning wore this mask pulled down over his face and wore this gray coat" to rob the four victims. The record discloses that during the third trial the State maintained the same theory of the case as in the fourth trial. Ferrell's only disagreement with the State's theory was that he was not the lone armed robber.

During the hearing on Ferrell's motion to dismiss prior to the fourth trial, the trial judge, who also presided over the third trial, stated the issue at the third trial as follows: "[W]e all agree one person is accused of doing it, and one person is accused of doing it with the use of a handgun,

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[5] The record before us does not contain a complete transcript of the third trial. Portions were ordered by the Court of Special Appeals. Since the third trial resulted in no verdict adverse to the defendant, there was no reason for him to have ordered a transcript under Maryland Rule 8-411. Moreover, until the case reached the Court of Special Appeals, it was undisputed that at the third trial the only contested issue under both the handgun and the armed robbery counts was the identity of the sole robber using a handgun. Because there was no dispute in the trial court as to this matter, there was little reason for the defendant to have ordered a transcript. Despite the absence of a complete transcript, the record is sufficient for us to decide this case.

and the defendant says I am not that person . . . . " Later the trial judge reiterated that "everybody agrees" that there was a crime of violence committed by one person with a handgun, and the issue is whether the defendant is that person. The prosecution at no point disagreed with the trial court's statements concerning the case and the issue. Furthermore, in Ferrell's written motion to dismiss, he pointed out that "[a]t each trial, the State's theory was that there was only one robber involved, the defendant, and there was no dispute that a gun was used by that robber." The State expressed no disagreement with this. Thus, it has been undisputed in this case that an armed robbery was committed by one man with an operative handgun. Ferrell's only defense was that he was not that man.

Ferrell was tied to this crime because of the long gray coat he was carrying when he was arrested and testimony that he was seen with the shopping bag containing the stolen goods.[6] There was never a positive identification made of the robber by the victims. Furthermore, when he was arrested Ferrell was dressed nothing like the robber. The State attempted to explain this discrepancy through the testimony of one of the victims who saw the robber changing clothes as he fled the scene. In closing argument, the State went to great lengths to tie all of this circumstantial evidence to Ferrell in an attempt to persuade the jury that Ferrell was indeed the man who terrorized the four victims with a gun. Finally, the jury was never given an accomplice instruction at either the third trial or the fourth trial.[7]

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[6] As previously mentioned, at the fourth trial, one of the arresting officers testified that he saw Ferrell drop the shopping bag at the corner of an apartment building. It came out on cross examination, however, that at the third trial this same witness testified that he did not actually see the dropping of the bag.

[7] During Ferrell's pre-trial motion to dismiss at the fourth trial the

The State's argument, accepted by the Court of Special Appeals, that the acquittal on the handgun charges might reasonably have been based on a jury finding that Ferrell was an accomplice, instead of the person wielding the handgun, is totally contrary to the record in this case. *See Turner v. Arkansas, supra*, 407 U.S. at 369-370, 92 S.Ct. at 2098-2099 (applying collateral estoppel and rejecting, based upon review of record and jury instructions, State's argument that acquittal on murder charge at first trial might be based on theory that petitioner was accomplice of murderer and thus might be subsequently prosecuted for robbery of the same victim). The sole disputed issue at the third trial, and the issue submitted to the jury, was whether the defendant Ferrell was the one person involved in robbing the four victims with a handgun. Under the principles set forth in *Ashe v. Swenson, supra*, and *Powers v. State, supra*, the acquittal on the handgun charge resolved this identity issue in Ferrell's favor and precluded the State from relitigating the issue.

II.

Alternatively, the State argues that we should overrule *Powers v. State*. The State contends that *Powers* was wrongly decided and that collateral estoppel should not prevent a retrial on a count of an indictment where the jury had been unable to agree, but where the jury had acquitted on another count of the indictment having a common issue of ultimate fact which, if found in the defendant's favor, would establish his innocence on both of the counts.

In the present case, in *Powers*, and in similar cases arising elsewhere, various arguments have been made against the application of collateral estoppel under circum-

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trial judge discussed how she charged the jury at the third trial. No accomplice instruction was included in that charge.

stances like those in this case. The great majority of cases, however, have rejected these arguments.

The principal arguments that have been made against applying collateral estoppel in this situation have involved reliance upon the rule that inconsistent jury verdicts ordinarily are tolerated. *See, e.g., Wright v. State*, 307 Md. 552, 576, 515 A.2d 1157 (1986); *Shell v. State*, 307 Md. 46, 53-55, 512 A.2d 358 (1986); *Mack v. State*, 300 Md. 583, 593-595, 479 A.2d 1344 (1984); *Ford v. State*, 274 Md. 546, 551-553, 337 A.2d 81 (1975), and cases there reviewed. This reliance is misplaced for two reasons.

First, as this Court pointed out in *Powers*, there is no inconsistency between an acquittal on one count and no verdict on another count. The Court there stated (285 Md. at 285, 401 A.2d at 1040):

> "In our view, there can be no inconsistency in a jury's findings of fact when it acquits on one count and is unable to agree on another count having a common issue of ultimate fact, which if found in favor of an accused would establish his innocence on both counts. In Maryland, a mistrial is equivalent to no trial at all. *Cook v. State*, 281 Md. 665, 671, 381 A.2d 671, 674 (1978). It is not a final determination and decides no question of fact. Accordingly, a jury's failure to agree, which results in a mistrial, does not establish any facts, and thus cannot establish facts inconsistent with those established by its verdicts of acquittal. *United States v. Smith*, 337 A.2d [499] at 503-04 [1975] (Kern, J., concurring).
>
> "*Ashe* requires the doctrine of collateral estoppel to be applied whenever an issue of ultimate fact has once been determined by a valid and final judgment of acquittal. 397 U.S. at 443, 90 S.Ct. at 1194. Here, the only valid and final judgments before us are the jury's verdicts of ac-

> quittal. There is no question that those verdicts do constitute a valid determination of issues of ultimate fact. Because the jury's failure to agree did not decide any facts, it did not make the validity of that determination questionable. Accordingly, the doctrine of collateral estoppel applies."

Second, even if the jury's failure to agree on one count is viewed as inconsistent with an acquittal on another count of a multicount indictment where the disputed issue under both counts was the same, the rule that inconsistent jury verdicts are allowed has no application to the situation in *Powers* and in the present case. The rule concerning inconsistent jury verdicts simply means "that a conviction on one count may . . . stand . . . [despite] an inconsistent acquittal on another count." *Ford v. State*, *supra*, 274 Md. at 552, 337 A.2d at 85, quoting *Leet v. State*, 203 Md. 285, 293, 100 A.2d 789 (1953). It relates to inconsistency at the same trial, and has no application to successive trials.[8] *See United States v. Powell*, *supra*, 469 U.S. at 64, 68, 105 S.Ct. at 476, 478 (inconsistent verdict rule applies "to verdicts rendered by a single jury"; it applies where "the same jury reached inconsistent results"). The rule does not authorize a second trial on an issue which has been resolved against the prosecution. Referring to language in *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356 (1932), which suggested that there may be inconsistent verdicts at successive trials, where the first verdict was an acquittal, the Supreme Court in the *Powell* case, 469 U.S. at 64, 105 S.Ct. at 476, stated:

> "The . . . statement [from *Dunn*], if not incorrect at the time, see *United States v. Oppenheimer*,

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[8] Some of the decisions relied on by the State in the present case simply involve the inconsistent verdict rule in the context of a single trial, and do not involve an attempted reprosecution. *See, e.g., State v. Dominique*, 619 S.W.2d 782, 786 (Mo. App. 1981).

> 242 U.S. 85, 87, 37 S.Ct. 68, 69, 61 L.Ed. 161 (1916), can no longer be accepted in light of cases such as *Sealfon v. United States*, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948), and *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), which hold that the doctrine of collateral estoppel would apply under those circumstances."

As the Supreme Court further pointed out in *Powell*, inconsistent verdicts in the context of a single jury trial are tolerated for certain policy reasons even though they represent "jury irrationality," whereas "principles of collateral estoppel . . . are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict . . . ," 469 U.S. at 67-68, 105 S.Ct. at 478. When it comes to the prosecution's attempted relitigation at a second trial, of an issue resolved in the defendant's favor by an acquittal at an earlier trial, collateral estoppel and the assumption of jury rationality is applicable.

The difference between inconsistent verdicts in a single trial and the situation in the present case was discussed in detail in *United States v. Flowers*, *supra*, 255 F.Supp. 485, one of the opinions relied upon by the State in the instant case (State's Brief, p. 21). In *Flowers*, the jury at the first trial acquitted the defendant on several counts of an indictment and was unable to agree on several other counts, and the prosecution attempted to reprosecute the defendant on those counts where the jury was unable to agree. The court held that collateral estoppel barred the reprosecution on those counts having the same issue of ultimate fact which was resolved by the earlier acquittals. Addressing the prosecution's reliance on the rule that inconsistent jury verdicts are tolerated, the court in *Flowers*, 255 F.Supp. at 487, initially observed that, with regard to the permissibility of the reprosecution,

> "[i]t must be assumed that the [earlier] jury was aware of all the facts in evidence and that it logically and properly applied the instructions of the court in reaching its verdict of acquittal. The possibility that the jury acquitted by reason of charity, compromise or simple frustration flowing from hours of tedious debate is barred from the court's consideration."

The court then stated (*id.* at 487-488):

> "Had the jury in the instant case convicted the defendant on one of the counts on which they failed to reach a verdict, the conviction would not be subject to attack on the ground of inconsistency with any of the other counts upon which the defendant was acquitted. However, the jury did not convict Flowers on any of the 26 counts of the indictment; a conviction on one of the 13 remaining counts would be rendered by a different jury at a point later in time. As in *Dunn*, any inconsistency would be between different counts of the same indictment but, as in *Sealfon*, a conviction would come at a date later than the acquittal on the other counts and from a new jury."
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> "In the context of a situation such as that presented here, i.e., a verdict of acquittal on some counts coupled with the jury's inability to reach a verdict on other counts, the application of the *Sealfon* rationale requires the Court to assume that the jurors have been logical in reaching their decision on the acquitted counts, yet the ultimate result will often be a conclusion that the jurors, or some of them, were illogical and inconsistent in failing to acquit on the remaining counts."

Turning to the cases relied on by the prosecution, the *Flowers* court explained (*id.* at 489):

> "The government relies upon language in United States v. Petti, 168 F.2d 221, 224 (2d Cir. 1948), to the effect that the doctrine of res judicata has no application to different counts in the same indictment or to consolidated indictments. Similar wording has been used in a number of cases. . . . [citations omitted]. These statements, however, have uniformly been uttered against the factual background of allegedly inconsistent jury verdicts rendered at the same time by the same jury and must be construed against that background. In contrast, the issue to be determined here is whether a verdict of guilty upon a retrial by a new jury would necessarily be inconsistent with the finding of not guilty on any of the 13 counts of the indictment disposed of at the first trial.
>
> "My conclusion [is] that the collateral estoppel principle is applicable in the instant setting . . . ."

The court also pointed out (*id.* at 488) that the authorities

> "uniformly support the application of the collateral estoppel principle to the situation where, as here, the jurors have acquitted on some counts and have been unable to reach a verdict on others. See *United States v. Kenny*, 236 F.2d 128 (3d Cir.), *cert. denied*, 352 U.S. 894, 77 S.Ct. 133, 1 L.Ed.2d 87 (1956) (separate indictments tried together); Cosgrove v. United States, *supra* [224 F.2d 146 (9th Cir. 1955)], (multiple count indictment); *United States v. Perrone*, 161 F.Supp. 252 (S.D.N.Y. 1958) (multiple count indictment)."

The applicability of the inconsistent verdict rule, under circumstances like those in the present case, was also dis-

cussed in detail by the United States Court of Appeals for the Second Circuit in *United States v. Mespoulede*, *supra*, 597 F.2d at 336-337. As in the case at bar, *Mespoulede* involved an acquittal on one count of an indictment and a hung jury on a second count, where both counts involved a common issue of fact. The government reprosecuted the defendant on the second count. In holding that the principles of collateral estoppel were applicable to the second trial, the United States Court of Appeals stated (597 F.2d at 336):

> "Finally, it is argued that the principles of collateral estoppel are inapplicable to the retrial of charges contained in a multicount indictment. . . .
>
> "At first blush, it may seem odd that such a broad rule is pressed upon us, especially since the burden of litigating an issue that the defendant thought had been laid to rest for all time is no lighter than in the first trial. And indeed, with virtual unanimity, the cases have applied collateral estoppel to bar the Government from relitigating a question of fact that was determined in defendant's favor by a partial verdict. *See Green v. United States*, 138 U.S. App. D.C. 184, 426 F.2d 661 (1970) (*per curiam*); *Travers v. United States*, 118 U.S. App. D.C. 276, 281, 335 F.2d 698, 703 (1964); *Cosgrove v. United States*, 224 F.2d 146 (9th Cir. 1955); *United States v. Flowers*, 255 F.Supp. 485 (E.D. N.C. 1966); *United States v. Pappas*, 445 F.2d 1194, 1199 (3d Cir.) (dictum), *cert. denied*, 404 U.S. 984, 92 S.Ct. 449, 30 L.Ed.2d 368 (1971); *United States v. Perrone*, 161 F.Supp. 252, 258-59 (S.D.N.Y. 1958) (dictum)."

Turning to the government's reliance upon the inconsistent verdict rule, the court said (*id.* at 336-337):

> "But it hardly follows from the fact that a single jury in one trial is allowed to render inconsistent verdicts that a *second* jury in a *second* trial should be permitted to rely on the evidence rejected by the first.
>
> "We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in our jurisprudence."

And later the court continued (*id.* at 337):

> "Internal inconsistency . . . is not an end in itself, and it would be irrational to expand gratuitously the judicial tolerance of inconsistent verdicts to permit different juries in successive trials to reach contradictory results. Allowing a second jury to reconsider the very issue upon which the defendant has prevailed serves no valuable function. To the contrary, it implicates concerns about the injustice of exposing a defendant to repeated risks of conviction for the same conduct, and to the ordeal of multiple trials, that lie at the heart of the double jeopardy clause. *See, e.g., Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957)."

Another argument made against applying collateral estoppel in the circumstances of the case at bar, is that the earlier jury, because it was hung on certain counts involving the common issue of ultimate fact, did not resolve that issue in the defendant's favor. In other words, by focusing exclusively on the count or counts where the jury was unable to agree, there may be some force in the contention that the jury did not decide the critical issue in the defendant's favor. Nevertheless, as discussed by the court in *United States v. Flowers*, *supra*, 255 F.Supp. at

487-488, principles of collateral estoppel require that the focus be upon the jury's earlier acquittal, with that acquittal being viewed as a rational resolution of the underlying facts. Moreover, it is logical to focus upon the counts where the jury reached verdicts rather than upon counts representing no decision and establishing nothing. *See Powers v. State*, *supra*, 285 Md. at 285, 401 A.2d at 1040.

The State in the present case also invokes the settled rule that the double jeopardy prohibition ordinarily does not preclude a retrial following the declaration of a mistrial because the jury was unable to agree. *See, e.g., Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); *Arizona v. Washington*, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978); *United States v. Perez*, 9 Wheat. (22 U.S.) 579, 6 L.Ed. 165 (1824); *Wooten-Bey v. State*, 308 Md. 534, 542-543, 520 A.2d 1090, *cert. denied*, 481 U.S. 1057, 107 S.Ct. 2199, 95 L.Ed.2d 853 (1987); *In re Mark R.*, 294 Md. 244, 250-251, 449 A.2d 393 (1982), and cases there cited. Those cases, and others like them, did not involve a collateral estoppel bar because of an acquittal at the earlier trial on a count having a common issue of ultimate fact with the count on which the jury was hung and which is the subject of the second prosecution. In the instant case, if the jury had not acquitted the defendant of the handgun charges, or if the handgun charges had not involved the same disputed issue as the armed robbery charges, the above-cited cases would be fully applicable and a retrial on the the armed robbery charges would not be precluded by double jeopardy principles. *See Wooten-Bey v. State*, *supra*, 308 Md. at 543-545, 520 A.2d at 1094-1095, for a discussion of this very distinction. Nothing in the above-cited cases, however, supports the view that the State is entitled to relitigate the facts or issues resolved against it by a previous acquittal. Instead, as the Supreme Court has stated, the policy of the double jeopardy prohibition "protects the accused from

attempts to relitigate the facts underlying a prior acquittal," *Brown v. Ohio*, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977).

As previously indicated, the overwhelming majority of cases take the position that the principles of collateral estoppel are applicable to the situation presented in *Powers v. State*, *supra*, 285 Md. 269, 401 A.2d 1031, and in the case at bar. *See, e.g., United States v. Gornto*, *supra*, 792 F.2d 1028; *United States v. Bowman*, 609 F.2d 12, 17 (D.C. Cir. 1979); *United States v. Larkin*, *supra*, 605 F.2d 1360; *United States v. Mespoulede*, *supra*, 597 F.2d 329; *Green v. United States*, 138 U.S. App. D.C. 184, 426 F.2d 661 (1970); *United States v. Kenny*, 236 F.2d 128, 130 (3d Cir.), *cert. denied*, 352 U.S. 894, 77 S.Ct. 133, 1 L.Ed.2d 87 (1956); *Cosgrove v. United States*, 224 F.2d 146 (9th Cir. 1954); *United States v. Hans*, *supra*, 548 F.Supp. at 1124-1126; *United States v. Mulherin*, 529 F.Supp. 916, 933 (S.D. Ga. 1981), *aff'd*, 710 F.2d 731, 740-743 (11th Cir. 1983), *cert. denied*, 464 U.S. 964, 465 U.S. 1034, 104 S.Ct. 402, 1305, 78 L.Ed.2d 343, 79 L.Ed.2d 703 (1983, 1984); *United States v. Flowers*, *supra*, 255 F.Supp. 485; *Oliver v. Superior Court*, 92 Cal.App. 94, 267 P. 764 (1928); *Com. v. Todd*, 348 Pa.Super. 453, 502 A.2d 631 (1985); *Com. v. Jones*, 274 Pa.Super 162, 418 A.2d 346, 350-351, *cert. denied*, 449 U.S. 876, 101 S.Ct. 221, 66 L.Ed.2d 98 (1980).[9] In light of this authority, and the reasons underlying the holding in *Powers v. State*, *supra*, we adhere to that holding.

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[9] There is a minority position, represented mostly by cases in New Jersey. *See State v. Esposito*, 148 N.J.Super. 102, 371 A.2d 1273, *certif. denied*, 74 N.J. 260, 377 A.2d 669 (1977); *State v. Triano*, 147 N.J. Super. 474, 371 A.2d 734 (1974); *United States v. McGowan*, 385 F.Supp. 956 (D. N.J. 1974). *But see United States ex rel. Triano v. Superior Court of N.J.*, 393 F.Supp. 1061 (D. N.J.), *aff'd*, 523 F.2d 1052 (3d Cir. 1975), *cert. denied*, 423 U.S. 1056, 96 S.Ct. 787, 46 L.Ed.2d 645 (1976).

The State in this case had more than " 'one full and fair opportunity to convict' "[10] the defendant Ferrell of robbery with a handgun. After three trials, a jury acquitted Ferrell of committing robbery with a handgun. Consequently, the State should not have been permitted to relitigate this issue at a fourth trial.

JUDGMENT OF THE COURT OF SPECIAL APPEALS REVERSED, AND CASE REMANDED TO THAT COURT WITH DIRECTIONS TO REVERSE THE JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AND TO REMAND THE CASE TO THE CIRCUIT COURT FOR BALTIMORE CITY WITH DIRECTIONS TO DISMISS THE INFORMATIONS. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY THE MAYOR AND CITY COUNCIL OF BALTIMORE.

McAULIFFE, Judge, dissenting.

I disagree with Part I of the Court's opinion, and with the result. The doctrine of collateral estoppel prohibits the State from relitigating a fact that has been finally decided against the State in a previous proceeding between the parties. Ferrell says, and the majority agrees, that this record shows that the jury in the third trial decided that Ferrell was not the person who robbed these four victims. I cannot agree.

In the first place, the record that Ferrell presents for this Court's consideration is insufficient to show much of anything about what occurred at the third trial. In the face of clear language by the Supreme Court in *Ashe v. Swenson*, 397 U.S. 436, 444, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), repeated by this Court in *Powers v. State*, 285 Md. 269, 278, 401 A.2d 1031, *cert. denied*, 444 U.S. 937, 100 S.Ct. 288, 62 L.Ed.2d 197 (1979), that a court deciding a claim of collateral estoppel must "examine the record

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[10] *Wright v. State*, *supra*, 307 Md. at 577 n. 5, 515 A.2d at 1170 n. 5, quoting *Ohio v. Johnson*, 467 U.S. 493, 502, 104 S.Ct. 2536, 2542, 81 L.Ed.2d 425 (1984).

of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter," Ferrell did not provide a transcript of the proceedings of the third trial. The majority refers to the "absence of a complete transcript," when in fact we have virtually no transcript. At the direction of the Court of Special Appeals, the State furnished a few pages of transcript to assist that court in understanding the grounds for dismissal of certain other counts by the trial judge. Apart from that, as Judge Wilner pointed out for the Court of Special Appeals, no transcript was provided:

> [N]o part of the proceedings of the third trial, save the few pages of transcript dealing with the disposition of Counts 2-7, furnished by the State in response to our order, has been included in the record. We don't know, other than in a general way, what evidence was presented to that third jury; nor do we know what instructions were given or what argument was made to the jury.

Ferrell v. State, 73 Md. App. 627, 634, 536 A.2d 99 (1988).

More important, however, is this point—whatever the jurors in the third trial might have decided, we can be sure they did not decide that Ferrell was *not* the robber. Had they decided that, they would have found Ferrell not guilty of the robbery as well. It is absolutely illogical to conclude that the same jurors who unanimously found that Ferrell was not the man who robbed these victims with a handgun would be unable to reach a verdict on the robbery count.

The majority apparently holds that because the State is unable to demonstrate exactly why the jury reached the conclusion it did, the defendant must prevail. That, I suggest, is not a proper application of the principles of collateral estoppel.

The Supreme Court has said that the relevant inquiry is "whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe v. Swenson, supra*, 397 U.S. at 444, 90 S.Ct. at 1194. The Court cautioned that the inquiry must be approached "with realism and rationality," and "must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings." The only practical and rational conclusion that I can reach upon consideration of all the known circumstances of the third trial is that the jury could not have concluded that which Ferrell argues it must have concluded.

I cannot be certain why the jury found as it did on the charge of use of a handgun in the commission of a felony or a crime of violence. It may have erroneously concluded that the defendant did not "use" the handgun because no one was shot. It may have felt that the State had not proven the gun involved was a "handgun" within the meaning of our statute.[1] One cannot say, without speculating, why the jury reached the verdict it did. One can say, however, with confidence, that the jury did not reach that verdict because they found the defendant was not involved. I would affirm the conviction.

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[1] A "handgun" is defined by Maryland Code (1957, 1987 Repl. Vol.) Art. 27, § 36F. The definition does not include all hand-held guns or pistols. *See Howell v. State*, 278 Md. 389, 395-96, 364 A.2d 797 (1976).

APPENDIX B

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 213
September Term, 1987

AVERY V. FERRELL

v.

STATE OF MARYLAND

Wilner
Bishop
Robert M. Bell
JJ.

Opinion by Wilner, J.
Robert M. Bell, J., dissents

Filed: January 18, 1988

Just after 7:00 on the morning of April 10, 1985, a man brandishing a handgun and wearing a three-quarter length gray coat, white tennis shoes, and a ski mask robbed three women and a child standing at a bus stop in Baltimore City. He took a purse from each of the women and a school bag from the child. During the course of the robbery, a shot was fired. One of the victims—Mary Henderson—followed the robber as he made his escape and reported seeing him heading toward Swann Avenue, changing his clothes as he ran.

Police officers responded promptly. From the information obtained from the victims and from an anonymous call, several of them went looking for the assailant in the Uplands Apartment development, located on Swann Avenue about a block from the bus stop. Officer Wagner observed appellant emerging from the building at 405 Swann Avenue dressed in a blue-gray suit and carrying a gray jacket in one hand and a shopping bag in the other. Appellant walked away from the officer, at an increasingly brisk pace. When he got to a corner, he dropped the shopping bag and ran behind one of the buildings. Officer Wagner saw appellant cross Swann Avenue and go into the building at 400 Swann Avenue; he relayed that information by police radio to Officer Brown, who was also on the scene searching for the robber.

Officer Brown saw appellant go into 400 Swann Avenue carrying a gray coat; he followed him in and brought him back outside. Officer Garrity then arrived with the victims. Inside the shopping bag, picked up by Officer Wagner, were three purses, which the women, respectively, identified as their own, a ski mask, a glove, and a handgun containing five live rounds and one spent cartridge. Several of the victims identified the gray coat taken from appellant as looking like the coat worn by the robber. Also inside the shopping bag was a black vinyl case containing certain papers belonging to appellant.

None of the victims was able to identify appellant as the masked robber. Although the shopping bag certainly was full of incriminating evidence, appellant, directly disputing Officer Wagner's testimony, contended that he never had the shopping bag. He claimed that he was on his way to the Westside Skill Center, that he had stopped at 400 Swann Avenue to meet one Karen Lucas, a fellow student at that center, and that his school papers allegedly found inside the shopping bag, had been in his coat pocket.

As a result of this incident, the State's Attorney filed four criminal informations against appellant (Nos. 28514739-28514742), each charging him with the following eight offenses:

Count 1 - Robbery with a deadly weapon;

Count 2 - Attempted robbery with a deadly weapon;

Count 3 - Robbery;

Count 4 - Assault with intent to rob;

Count 5 - Assault;

Count 6 - Theft of less than $300;

Count 7 - Use of a handgun in the commission of a crime of violence; and

Count 8 - Unlawful carrying of a handgun.

Appellant was first brought to trial on all of these charges in November, 1985. He was convicted on all four counts of robbery with a deadly weapon (Count 1 of each information) and apparently on Counts 3, 5, 6, 7, and 8 of each information as well. It is not clear what happened to Counts 2 and 4, except that there is no indication (and appellant makes no contention) that he was acquitted on those counts at that time.

On February 22, 1986, the court granted appellant's motion for new trial on all counts set forth in the four informations.[1] He was brought to trial again in June, 1986; on that occasion, the jury was unable to reach a verdict on any of the counts, and so a mistrial was declared.

Appellant's third trial took place in August, 1986. Precisely what occurred at that trial is not altogether clear from the record before us—a matter we shall discuss in

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[1] In a separate (fifth) information, appellant was charged with assault with intent to murder. The jury acquitted him of that charge.

more detail later. It appears, however, that only five counts were submitted to the jury—the four flagship counts of robbery with a deadly weapon and one count of use of a handgun in the commission of a felony. The jury acquitted of the latter offense[2] but, once again, was unable to agree on Count 1.

Undaunted by its three false starts, and now down to only one count in each information, the State decided to try again. Prior to his fourth trial, appellant moved to dismiss Count 1 (of each information) on the related grounds of double jeopardy and collateral estoppel. His argument centered solely on the effect of his acquittal on Count 8. He posited that the only deadly weapon indicated by the evidence was a handgun, that his acquittal on Count 8 sufficed as a finding that he had not used a handgun, and that, *ergo*, a fact necessary to his prosecution on Count 1 had been decided in his favor and could not be relitigated. That conclusion, he urged, was mandated by *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

The court denied his motion, whereupon he was brought to trial for the fourth time on Count 1 of each information. He was convicted on all four charges, given substantial sentences, and appeals. He raises six issues, to which,

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[2] From everything that followed, it is apparent that the handgun count submitted to the jury in the third trial was actually Count 7 of the information—use of a handgun in the commission of a crime of violence—and not Count 8, charging unlawful carrying of a handgun. The parties have consistently referred to the acquittal as Count 8, however. The original information contained nine counts. At some point, Count 6, charging theft, was struck and the ensuing Counts 7, 8, and 9 were renumbered as Counts 6, 7, and 8, respectively. The "use of a handgun" charge, originally Count 8, became Count 7. In order to maintain consistency with the statements and arguments in the briefs, we shall refer to the handgun charge submitted to the jury at the third trial as Count 8.

nostra sponte, we have added a seventh. In the end, we shall affirm.

(1), (2)

Double Jeopardy/Collateral Estoppel

In the "Statement Of The Case" section of his brief, appellant informed us that, at this third trial, the court disposed of Counts 2 through 7 of each information by granting "judgments of acquittal" as to them. The State did not challenge that assertion in its brief, and indeed the docket entries for the third trial clearly indicate that disposition.[3] Aware that Count 3 of each information charged simple robbery, a necessary included element in robbery with a deadly weapon, we questioned whether, in light of that disposition, retrial on Count 1 might be precluded under *Wright v. State*, 307 Md. 552, 515 A.2d 1157 (1986). Given the generally dismal state of the record,[4] however, we directed the parties to address that issue and, if necessary, to supplement the record in order to address it.

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[3] The entry for August 11, 1986, states: "As to each [information], oral motion for judgment of acquittal heard and denied as to the *1st* and *8th* Counts and granted as to the *2nd, 3rd, 4th, 5th, 6th, 7th* Counts. Bothe, J."

[4] Just by way of example, we observe that (1) the *original* docket entries were not included, (2) several critical State's exhibits are omitted, (3) the court reporter who recorded the proceedings of November 17 showed the case being tried before Judge Hubbard when in fact it was tried before Judge Bothe, and (4) two quite different exhibits are shown as admitted as State's Exhibit 2, neither of which are included in the record. We note further that, in clear derogation of the requirements set forth in The Maryland Court Reporters' Manual, published by the Administrative Office of the Courts, the transcripts of the fourth trial do not contain a table of contents showing "all exhibits and where they are marked for identification and received in evidence." *Id.*, Subject: Appeal Transcript of Proceedings, p.2. Indeed, the transcript for November 17 has no table of contents at all.

In response to that order, the State filed certain excerpts from the transcript of proceedings at the third trial, which we have accepted as a supplement to the record. Md.Rule 1027.

At the conclusion of the State's case at the third trial, defense counsel moved for judgment of acquittal, arguing briefly that the State had failed to show "that the evidence seized was in possession of my client and that he is, in fact, the robber that's involved in this case." The motion was denied. At the end of the entire case, counsel renewed the "motion for judgment of acquittal at this time for the same reasons. . . ." Without responding to the motion, the court asked the prosecutor which counts he was pressing; he replied that he wanted "the four armed robbery counts and the four handgun counts to go to the jury." The judge then said that it was her practice in multiple robbery cases to send only one handgun count to the jury, as she was not inclined to give consecutive sentences if there were multiple convictions on that count. The prosecutor indicated no objection to that approach. The colloquy then concluded thusly:

> "THE COURT: Now, do you [defense counsel] have any argument as to the first and eighth counts?
>
> MS. JULIAN: No, your Honor. I'll submit on the record on the motion.
>
> THE COURT: All right. Well, it will go to the jury as to each of the indictments [*sic*, informations] on the first and eighth counts although I will only require one verdict as to the eighth."

From this, it is clear that the docket entry for August 11 is indeed in error. The court never entered a judgment of acquittal as to Counts II through VII, and it certainly never ruled, or even suggested, that the evidence presented by the State was legally insufficient with respect to those counts. It is apparent that the State simply de-

cided not to press those middle counts, as in *Bynum v. State*, 277 Md. 703, 357 A.2d 339, *cert. denied* 429 U.S. 899, 97 S.Ct. 264, 50 L.Ed.2d 183 (1976). The predicate for the Court's ruling in *Wright v. State*, *supra*, 307 Md. 552, 515 A.2d 1157—a finding by the trial court of evidentiary insufficiency on a lesser included offense—is missing here. On the more complete record, therefore, we find no merit to the issue that appeared to be very real from the record as we received it.

Appellant's double jeopardy/collateral estoppel argument, as we observed, rests on the implication he draws from his acquittal on Count 8. In *Powers v. State*, 285 Md. 269, 401 A.2d 1031, *cert. denied* 444 U.S. 937, 100 S.Ct. 288, 62 L.Ed.2d 197 (1979), the Court of Appeals, after reviewing what it regarded as the relevant pronouncements of the Supreme Court, concluded that

> "the doctrine of collateral estoppel applies after a jury, at a single trial, acquits on one count of a multicount indictment and is unable to agree upon a verdict on a related count of the same indictment *involving a common issue of ultimate fact, which if found in favor of an accused would establish his innocence on both counts.*"

Id., at 288, 401 A.2d 1031. (Emphasis added.)

As initially pointed out in *Ashe v. Swenson*, *supra*, 397 U.S. at 444, 90 S.Ct. at 1194, and as reiterated in *Powers* and later in *Wooten-Bey v. State*, 308 Md. 534, 544, 520 A.2d 1090 (1987), collateral estoppel in criminal cases "is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality." Quoting from *Ashe*, the *Wooten-Bey* Court held that the reviewing court must "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict

upon an issue other than that which the defendant seeks to foreclose from consideration." *Id.*

Appellant has not given us much of an opportunity to do that, for no part of the proceedings of the third trial, save the few pages of transcript dealing with the disposition of Counts 2-7, furnished by the State in response to our order, has been included in the record. We don't know, other than in a general way, what evidence was presented to that third jury; nor do we know what instructions were given or what argument was made to the jury.

Appellant's position is very simple and direct: "[T]he use of a deadly weapon is a necessary element for conviction under Article 27, Section 488. Here the Appellant was found not guilty of the use of the handgun in the third trial. The only State theory of the case was that a handgun was involved."

The State has a somewhat more conjectural view. It notes, on the one hand, that the robber wore a mask, that none of the victims were able to identify appellant, and that he was dressed differently when apprehended than was the robber at the time of the robbery; on the other hand, it stresses that he was in possession of the gun and the fruits of the crime shortly before his apprehension. From this, the State posits that the third jury may have concluded that appellant was not the actual robber (or wielder of the handgun) but may have entertained some feeling, short of unanimity, that he was an accomplice of or receiver for the actual robber, who escaped. That possibility, it argues, is not irrational under the evidence, and it would explain the acquittal on Count 8 and the inability to agree on Count 1. Indeed, the State notes that, at one point, defense counsel entertained the same notion based, apparently, on her conversation with some of the jurors on the third jury. At sentencing in this proceeding, she stated to the court:

> "[I] made a note and I remember going over that prior to this trial. Some of the jurors were saying that they could not agree, they could not say he was the actual gunman because the man's face was covered but they felt. . . [interruption by court] he was somehow involved. So I believe they had a theory there was more than one person involved and some way or another he came across the bag but was not the gunman."

In the absence of a more complete record of the third trial, which appears to have been available and which was appellant's duty to produce, it is impossible for us to make an objective analysis of which view is sounder.[5] But that is not really the test. The test framed in *Ashe*, *Powers*, and *Wooten-Bey* is "whether a rational jury *could have* grounded its verdict," as the State suggests, or other than as appellant suggests. Notwithstanding the trial judge's thoughts, from what is before us, we believe that the jury could have done so. With or without an accomplice instruction, members of the third jury could rationally have believed that appellant was criminally involved but was not the actual gunman. If *that* were the basis of its verdict on Count 8, the acquittal would not necessarily involve "a common issue of ultimate fact, which if found in favor of [appellant] would establish his innocence on both counts."

(3)

Partiality Of The Trial Judge

Appellant complains that the trial judge, Judge Bothe, "harangued defense counsel from day one, aided the able

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[5] The trial judge seemingly rejected that notion when suggested by defense counsel, stating that "[n]o one ever proposed more than one individual committed this crime. I don't even believe I instructed them on participation in the last trial because there's never been any indication that more than one person had a handgun, used a handgun, committed the four armed robberies. . . ." She expressed the belief that the jury "was totally ignorant of its responsibilities as jurors."

prosecutor whenever possible and presided in a totally narrow minded fashion, denying Appellant a fair and impartial trial." More particularly, he asserts that the judge "made short shrift of Appellant's collateral estoppel argument," that she "breezed through" a motion to stay to allow him to file an immediate appeal from the denial of his motion to dismiss, that she failed to "formally rule" on a motion to recuse herself, that she attempted to "assist the State" in its examination of Officer Brown, that she "went out of her way to rehabilitate the impeached officer," that she "commenced arguing . . . with defense counsel" and "went into a diatribe with counsel which was somewhat unintelligible," that she interrupted questioning by defense counsel, that her "predisposition" was "overwhelmingly against" appellant, and that "[h]er attitude was hostile."

These are, of course, very serious charges which, if true, would require a reversal. To determine whether, and to what extent, they *are* true, we have read nearly the entire transcript of the proceeding. Several conclusions emerge.

Appellant's statements that Judge Bothe "made short shrift" of his collateral estoppel argument and "breezed through" his motion for stay are wholly unfounded. Judge Bothe said that she had read the written motion to dismiss and some of the cases cited: she listened to counsel's argument but made clear that she simply did not agree with it. Counsel continued to press a point that the judge, on several occasions, said she found unpersuasive. The colloquy pertaining to that motion extended over 21 pages of transcript. As to the motion for stay, Judge Bothe noted that, with the three previous trials, the case had dragged on for over a year, and she could see no good reason to delay the ultimate resolution of appellant's guilt or innocence any longer. Her concluding statement, which appellate counsel seems to take wholly out of context, was:

> "Let the record reflect I read your cases. I read your memorandum. I read Pulley, and I cannot understand

> why the defendant is so reluctant to bring this case to finality. It's really a travesty that it has had to go on for so long without resolution. Let's hope this time a conclusion can be reached."[6]

Appellant did, as he claims, then ask Judge Bothe to recuse herself

> "because of the manner in which the case is proceeding and has proceeded so far, the anger expressed at counsel while trying to put the motion on the record, the fact that he does not feel like he will get a fair trial, having had the case heard in this court before."

The Court made no direct ruling on this motion; the judge simply ignored it and went onto other business. That, of course, was not only discourteous, but improper; appellant was entitled to a response. It is clear, however, that the motion was implicitly overruled, for Judge Bothe certainly did not recuse herself, and appellant never pressed for a response. On the merits, we find no basis at that point for a recusal. Neither the loss of pretrial motions nor the fact that Judge Bothe had presided at the third trial would be sufficient grounds to require recusal; and, although we cannot discern voice inflections or mannerisms from a transcript, we can find nothing in the written record to demonstrate anger on the part of the judge.

The major thrust of appellant's argument goes to the judge's intervention in the questioning of certain witnesses and to arguments that took place between Judge Bothe and defense counsel. A good bit of this took place during counsel's cross-examination of Officer Brown, when counsel attempted to point out and examine the officer with re-

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[6] The "travesty" referred to by Judge Bothe was the delay in resolution. In his brief, counsel accuses the judge of stating that "the *case* was a 'travesty' to that point." (Emphasis added.) That is a flat-out misstatement.

spect to perceived inconsistencies between his current testimony and testimony given at the earlier trials.

Judge Bothe did indeed step in at several points to clarify questions posed by counsel or to give the witness an opportunity to explain or clarify the alleged inconsistencies. Some of these intrusions were in response to objections by the prosecutor to particular questions or to the form of the cross-examination; some were *sua sponte* but to which no immediate objection by appellant was made; some were wholly unnecessary and served only to provoke an argument with defense counsel.

In *Bell v. State*, 48 Md.App. 669, 678, 429 A.2d 300, *cert. denied* 291 Md. 771 (1981), we cautioned that:

> "The trial judge's role is that of an impartial arbitrator and that appearance is not generally compatible with an inquisitorial role. It is the better practice for a trial judge to inject himself [or herself] as little as possible in a jury case . . . because of the inordinate influence that may emanate from his [or her] position if jurors interpret his [or her] questions as indicative of his [or her] opinion."

When a judge interjects himself or herself into a case to any significant extent, as, despite prior admonitions from this Court, Judge Bothe seems wont to do (*see McMillian v. State*, 65 Md.App. 21, 499 A.2d 192 (1985)), he or she invites this kind of argument and risks not only a reversal of the conviction but embarrassing censure as well. *See* Md.Rule 1231 (Md. Code of Judicial Conduct), Canon 3A.

The major confrontation between Judge Bothe and defense counsel came, as we indicated, during cross-examination of Officer Brown, the arresting officer. Most of it arose from an attempt by counsel to show that some of the details mentioned by the witness in his current testimony had not been mentioned by him in testimony given

at earlier trials. It was not clear, however, that the witness had ever been asked about those details at the prior trials; counsel did not show the witness the transcript of his earlier testimony or call his attention to specific questions and answers but simply challenged him for including some details for the first time. The court felt that was improper; counsel persisted; and an argument ensued.

Having considered the record as a whole and viewing the judge's interruptions and comments complained about in context, we conclude, as we did in *McMillian v. State*, *supra*, 65 Md.App. 21, 27, 499 A.2d 192, that "while the court should certainly have exercised greater restraint, the remarks were not tantamount to reversible error."

(4)

Suppression Of Officer Wagner's Testimony

Just before the actual commencement of trial, defense counsel moved *in limine* to suppress the entire testimony of Officer Wagner on the ground that he had committed perjury. This, in turn, was based on the assertion that, at appellant's second trial, Officer Wagner testified that he had observed appellant exit the building carrying the shopping bag, whereas at the third trial he said only that he saw appellant holding the bag and placing it down.

Our first response to appellant's complaint is that it was not preserved for appellate review. No objection was made to Officer Wagner's testimony at trial and no motion was made to strike it on this or any other ground. A pretrial motion *in limine* alone does not suffice to preserve an objection to evidence. *See Offutt v. State*, 44 Md.App. 670, 677, 410 A.2d 611 (1980); *Eiler v. State*, 63 Md.App. 439, 445-46, 492 A.2d 1320 (1985).

Even if the objection had been preserved, we would have found it utterly without merit. How the alleged inconsistency constitutes perjury was a mystery to Judge Bothe

and it is a mystery to us. While there may have been some inconsistency in the testimony given at the various trials, a point that was forcefully brought to the jury's attention by defense counsel, there was no evidence of perjury, and certainly no conviction of perjury, which is the necessary predicate for exclusion. See Md.Code Ann.Cts. & Jud.Proc. art., § 9-104: "A person *convicted* of perjury may not testify." (Emphasis added.)

(5)

Miranda

Officer Brown arrested appellant. He eventually filled out a report known as an arrestee data sheet containing certain information he received from appellant. The information, Brown said, is routinely asked; it includes the defendant's name, address, and date of birth. Brown said that appellant, whose name is Avery V. Ferrell, gave him the name James Edward Ferrell.

Appellant now claims that this "arrestee information" was taken in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), presumably meaning that adequate warnings were not given to him before this information was sought. Although appellant has failed to supply us with any factual foundation for that assertion, even if it were true there would be no error. As we held in *Grimes v. State*, 44 Md.App. 580, 586, 409 A.2d 767 (1980), *rev'd on other grounds* 290 Md. 236, 429 A.2d 228 (1981): "Until the Court of Appeals directs us otherwise, we shall adhere to the view that routine questions seeking a person's name and address are not proscribed by *Miranda*, and if the person answers such questions, he answers are not rendered inadmissible by the exclusionary rule announced in *Miranda*." (Footnote omitted.) *Cf. Mills v. State*, 278 Md. 262, 275, 363 A.2d 491 (1976).

(6)

Self-Incrimination

Appellant was represented by counsel at all four of his trials. Defense counsel in this case had represented him at his third trial and, although the record is not altogether clear on this, possibly at his first and second trials as well. Appellant had elected to testify in his own defense at one or more (perhaps all) of his earlier trials.

At the conclusion of the State's case, following the denial of appellant's motion for judgment of acquittal, this colloquy occurred:

> "[THE COURT:] As to the defendant's testifying or remaining silent, he has been advised of those rights very thoroughly I think, so I don't know that we need to formally do them again. You are aware of your rights in that regard, Mr. Ferrell. Is that right?
>
> THE DEFENDANT: (Nodding affirmatively)
>
> THE COURT: That you can testify or remain silent.
>
> THE DEFENDANT: Yeah.
>
> THE COURT: I don't think we need to review those."

Subsequently, without any further comment, counsel called appellant to testify. Appellant now claims he was not adequately informed of his right to remain silent. We find no basis for that assertion. See *Stevens v. State*, 232 Md. 33, 192 A.2d 73 (1963); *State v. McKenzie*, 17 Md.App. 563, 303 A.2d 406 (1973).

(7)

Request for Bench Trial

Appellant, who had elected a jury trial at his three prior trials, contends that, on this occasion, he twice requested a court trial and that the court erred in denying him one.

This is an incomplete and misleading statement of what occurred.

Upon resolution of the various preliminary motions, this colloquy ensued:

"THE COURT: Do you want a Court trial or a jury trial, Mr. Ferrell?

THE DEFENDANT: Right now?

THE COURT: Right now, because we are proceeding with the trial right now.

Do you want a Court trial or a jury trial?

THE DEFENDANT: I want a Court trial.

MS. JULIAN: Just a second. May I consult with my client?

(A discussion was held off the record between defense counsel and the defendant.)

THE COURT: Do you want to be tried by a judge, without a jury?

THE DEFENDANT: No.

THE COURT: You want a jury trial; don't you?

THE DEFENDANT: Yes.

THE COURT: Then you will have a jury trial, and I will preside over it.

MS. JULIAN: Your Honor, I was not finished.

THE DEFENDANT: Your Honor, can I say something?

THE COURT: Go back to the trial table."

The court thereupon directed the prosecutor to call the case, following which it recognized defense counsel:

"THE COURT: Ms. Julian?

MS. JULIAN: Good morning, Your Honor. Elizabeth Julian, Assistant Public Defender, on behalf of Mr. Ferrell.

THE COURT: Mr. Ferrell is praying a jury trial?

MS. JULIAN: Yes, we are requesting a jury trial.

THE COURT: Would you swear the jury, please?

THE CLERK: Members of the jury panel, please stand and raise your right hand.

THE DEFENDANT: I am not praying no jury trial.

(The prospective jurors were sworn on their voir dire.)"

Thereafter, the court conducted extensive voir dire, both sides moved to strike or excuse various prospective jurors, a jury was ultimately selected, and the jurors were sworn. Not another word was said about a court trial; at no time did either counsel or appellant express any dissatisfaction with the fact that the case would be tried by a jury. It is clear to us, notwithstanding appellant's ambiguous blurt, "I am not praying no jury trial," that, after discussion with his attorney, he elected a jury trial.

JUDGMENTS AFFIRMED; APPELLANT TO PAY THE COSTS.

ROBERT M. BELL, Judge, dissenting.

Contrary to the majority opinion, reversal is not merely warranted in this case, it is required. In my opinion, the crux of this appeal involves the question whether appellant received the fair trial that the Maryland and federal Constitutions guarantee him. A fair reading of the entire transcript of the trial, not just that portion concerning Officer Brown, reveals that appellant did not, and, indeed, could not have, received a fair trial before this trial judge. I therefore dissent.

At bottom, the issue does involve, as the majority in part 3 of its opinion recognizes, the court's interjection of itself in the trial by substantial and frequent interventions in the questioning of witnesses.

To be sure, a trial judge may question witnesses. In doing so, however, the trial judge must stay within appropriate bounds. We addressed the limits of those bounds in two recent cases, *Cardin v. State*, 73 Md.App. 200, 533 A.2d 928 (1987) and *Smith v. State*, 66 Md.App. 603, 505 A.2d 564, *cert. denied*, 306 Md. 371, 509 A.2d 134 (1986). In each, we quoted, with approval, from *Bell v. State*, 48 Md.App. 669, 678, 429 A.2d 300 (1981):

> The trial judge's role is that of an impartial arbitrator and that appearance is not generally compatible with an inquisitorial role. It is the better practice for a trial judge to inject himself as little as possible in a jury case, *United States v. Green*, 429 F.2d 754, 760 (D.C.Cir.1970), because of the inordinate influence that may emanate from his position if jurors interpret his questions as indicative of his opinion. *See, also, Patterson* [*v. State*, 275 Md. 563, 578-80, 342 A.2d 660 (1975)]. The appearance that a judge may have abandoned his role as an impartial arbitrator, is especially hazardous when cross-questioning a defendant.
>
> Yet, if counsel have faltered in their advocacies, it is not improper for the trial judge to be "meticulously careful to make sure that the full facts [are] brought out", *Jeffries v. State*, 5 Md.App. 630, 632, [248 A.2d 807] (1959), or to seek to discover the truth when counsel have not elicited some material fact, or indeed when a witness has not testified with entire frankness. Annot., 84 A.L.R. 1172, 1193 (1933). Such questioning may even bear upon the credibility of a defendant in a proper circumstance. *Madison v. State*, 200 Md. 1, 12 [87 A.2d 593] (1952); *King v. State*, [14 Md.App. 385, 287 A.2d 52, *cert. denied*, 265 Md.

> 740 (1972)] at 394 [287 A.2d 52]. This should be achieved expeditiously, however, if at all, for a protracted examination has a tendency to convey to a jury a judge's opinion as to facts or the credibility of witnesses.

Cardin, 73 Md.App. at 229-230, 533 A.2d 928; *Smith*, 66 Md.App. at 618-19, 505 A.2d 564.

The Court of Appeals has provided additional guidance. In *Vandegrift v. State*, 237 Md. 305, 311, 206 A.2d 250 (1965), the Court held that "[t]he questioning by the trial judge showing his disbelief of the witness' testimony [is] beyond the line of impartiality over which a judge must not step." There, the trial judge questioned the witness repeatedly on the same subject matter and reminded the witness that he was under oath and subject to penalty for perjury. *See also Marshall v. State*, 291 Md. 205, 213, 434 A.2d 555 (1981), in which the Court of Appeals stated:

> . . . [A] judge presiding over a jury trial . . . should exercise th[e] right [to interrogate witnesses to clarify issues] sparingly. It is a far more prudent practice for the judge to allow counsel to clear up disputed points on cross-examination, unassisted by the court. In this manner, the judge is most likely to preserve his [or her] role as an impartial arbiter, because he [or she] avoids the appearance of acting as an advocate.

The Court in *Brown v. State*, 220 Md. 29, 39, 150 A.2d 895 (1959), disapproved the questioning of a defendant by the trial judge in such a way as to "indicate sarcastically, so that the jury could not have failed to understand, that the judge did not believe [the story the defendant] was telling. . . ."

The permissible bounds of interjection and inquiry thus appear to be clear. A trial judge should interject himself or herself as little as possible into the trial of the case,

giving due opportunity for the advocates to present, in their own way, the facts in support of their cause. *See Marshall*, 291 Md. at 214, 434 A.2d 555. When the judge does interject himself or herself, it should be solely for the purpose of clarifying or sharpening issues or eliciting material facts which the advocates have not presented. The more protracted the examination of a witness, the more likely it is that the examination will convey to the jury the trial judge's opinion concerning the credibility of that witness.

Turning to the case *sub judice*, the majority has very considerately characterized the trial judge's actions in this case as stepping in "at several points to clarify questions posed by counsel or to give the witness an opportunity to explain or clarify the alleged inconsistencies." This characterization is not supported by the record. On the contrary, the record discloses that the trial judge, totally oblivious of any bounds, interjected herself repeatedly, into the proceeding. In fact, there were more than a hundred such instances. The judge participated, to some extent, in the questioning of each witness called to testify.

To be fair, some of the trial judge's interjections were innocuous and some were for the purpose of clarifying questions posed by counsel; the vast majority of them, however, were much more serious. A few examples are demonstrative. During the State's case, the court's interventions included participating freely and frequently in the direct examination of witnesses,[1] assisting the assistant State's Attorney in the presentation of his case,[2] when he

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[1] By way of example, the judge interrupted the direct examination of Mary Henderson and Cherome Hines, witnesses to the robbery, as well as Officers Brown and Wagner, on several occasions, and proceeded to conduct the questioning of those witnesses.

[2] During the State's examination of Officer Brown, the trial judge interrupted direct examination to direct the officer's attention to appellant for the purpose of identification. She also assisted the State by

did not wish help, and, indeed, resisted it;[3] interrupting cross-examination by defense counsel to assist State's witnesses in responding to questions;[4] and explaining the testimony of State's witnesses.[5] The trial judge also rephrased questions, rather than ruling on objections by defense.[6]

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developing testimony concerning the time that elapsed between the officer seeing a gun and apprehending appellant. Similarly, while Officer Wagner was on the witness stand, the judge stated, "I think he can tell us what the description was", thus suggesting that the State ask Officer Wagner to relate the description of the robber given him by one of the witnesses. Other efforts to assist the State in similar ways occurred during the testimony of Hines and Barbara Means.

In the case of Means, the judge, as she did during Brown's testimony, asked the witness to identify the robber, which, as the State reminded her, she had already done.

[3] When the judge reminded the State that it had not questioned Officer Brown about a "briefcase" which the police had recovered, the State had to point out to her that his concern at that time was what the officer observed at the scene and that the officer had not seen the "briefcase" at the scene. Also *see* the reference to Barbara Means in n. 3, *supra*.

[4] Examples of this case be found during the cross-examinations of Officers Brown, Garrity, and Wagner and of Mary Henderson. In the case of Officer Brown, the judge provided assistance on more than one occasion. On one occasion, after defense counsel had read from the officer's prior testimony, and before the officer had answered a question based on that prior testimony, the judge prompted:

> "If you previously testified that you had the coat when you went out of the building, would that be what happened, that you did have the coat?"

On another, the court interrupted defense counsel to observe:

> "Ms Julian, he does not deny what he said before and I believe he said if you have a record saying he said it before, that's what he said. Is that right officer?"

The record does not reflect that the officer said any such thing.

[5] In addition to explaining testimony given by Officer Brown, the trial judge also interpreted the testimony of Officer Wagner.

[6] A good example of this occurred during the State's direct exami-

Moreover, in addition to correcting defense counsel in front of the jury and suggesting how questions should be phrased, the trial judge raised objections *sua sponte*.[7] During the defense case, the judge, without regard to, and in fact, in spite of, the defense strategy, cross-examined defense witnesses during their direct examination.[8] In some

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nation of Hines. Although appellant's counsel objected to the question, "Were you able to see anything about this individual although you couldn't see his facial features?", the judge never ruled on the objection. Instead, she instructed the witness:

> "You can tell us what you can tell us about what he was wearing, what he looked like insofar as you were able to see him. She already said . . .
>
> Tell us everything you can remember of what you were able to observe of him."

Other examples occurred during the testimony of Officer Brown and Mary Henderson.

[7] During the cross-examination of Officer Brown, the following colloquy occurred:

> [by defense counsel] You also reported that Mrs. Henderson stated that she saw the suspect go into 4608 Manordene and exit a short time later after the actual robbery wearing a light windbreaker carrying a black duffel bag and then run North through the complex of—
>
> The Court: This is all hearsay. This is something she told somebody else?
>
> The Witness [Off. Brown]: This was told Officer Garrity.
>
> Mr. Townsend [Prosecutor]: I have had a continuing objection to this.
>
> The Court: I sustain.

The record does not reflect that a continuing objection had been granted the prosecutor. Later, the court sustained an objection which was never made. Although defense counsel pointed this out to her, the judge did not respond.

[8] In addition to appellant, the trial judge cross-examined appellant's brother (concerning the distance from Westside Skill Center, where

instances, the trial judge anticipated issues which had not yet been raised and, in at least one other, questioned a witness concerning his testimony in a prior trial.[9]

Throughout trial, the trial judge asked questions repetitious of testimony already given by the witness, thus emphasizing that testimony for the jury.

Specific reference to the trial judge's actions during the testimony of appellant and Wheatley further demonstrates the egregiousness of the judge's conduct. The judge interrupted appellant's direct examination to question appellant or make observations on seven occasions. On the first, the judge referring to appellant's reference to a Kuti, asked, "You mean a muslim type thing?[10] The next three interruptions were for the purpose of asking questions that rehashed testimony previously given by appellant, thereby emphasizing it to the jury. During cross-examination, the judge interrupted the prosecutor to question appellant about using other names. In addition, when appellant began to respond broadly to a broad question asked by the prosecutor, the judge instructed him to "just answer the question", and immediately thereafter interpreted his explanation as; "You mean that he [a police officer] lied." The judge's participation in redirect examination continued to be frequent and active.

The trial judge's interjections during the testimony of Wheatley were more serious. Demonstration of the cor-

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appellant testified he was going, to 904 West Lexington Street, where appellant lived), his mother (concerning the relationship between appellant and a defense witness), L. Leurs, an investigator for the public defender, and Delano A. Wheatley, the defense witness who claimed to have seen the robber, whom he testified was not appellant.

[9] This occurred during the cross-examination of Leurs.

[10] This is significant because Henderson had testified that appellant was wearing a "muslim type of head covering" after he had changed clothes and because the judge did not await the completion of direct examination to begin her questioning.

rectness of this assertion is perhaps best achieved by quoting pertinent excerpts directly from the record, as appropriate. The trial judge's first interruption came early in the direct examination of Wheatley and it was for the purpose of asking the witness what time he had first seen appellant. The next interruption occurred as follows:

> Q. (By appellant's counsel) Let me ask a general question. Under what circumstances did you see Mr. Ferrell that day?
>
> A. I had noticed Mr. Ferrell being arrested as I was leaving my girlfriend's house one morning. That's how I remember his face. Right now I am presently incarcerated and I had noticed Mr. Ferrell at the jail where I am being detained and I had remembered his face from being arrested.
>
> Q. Had you noticed anything unusual before you noticed the arrest?
>
> A. Yes, ma'am, I did. Early in the morning I noticed a guy running by me removing a mask from his head.
>
> The Court: You say you were staying at your girlfriend's house?
>
> The Witness: Yes, I was there the night before.
>
> The Court: Where does she live?
>
> The Witness: On Swan. Upland Apartments.

The next significant interruption occurred after Wheatley had testified concerning the complexion and weight of the robber. At that time the court interrupted to ask "What do you consider yourself to be?", to which the witness replied, "Well, I'm dark or medium dark I suppose." When the focus of the examination turned to Wheatley's observation of appellant's arrest, the following occurred:

Q. (By appellant's counsel): Now, did there come a time where you saw the arrest? That's what you've testified, correct?

A. Yes, ma'am. I had noticed Mr. Ferrell being arrested after I had left my girlfriend's house about twenty, thirty minutes later and—

The Court: Twenty or thirty minutes had gone by since you saw the man with the--taking off the mask?

The Witness: About. Yes, ma'am. I got the cigarettes, went back to my girlfriend's house and had breakfast. In that amount of time, maybe thirty minutes is when I left for good at which time I came out. This is when I noticed Mr. Ferrell.

The Court: Being arrested.

The Witness: Yes, ma'am. That's correct.

The Court: You had never seen him before that day?

The Witness: No, ma'am, I had not.

Similar interruptions occurred during Wheatley's cross-examination. After the prosecutor had explored the circumstances under which Wheatley had seen appellant being arrested and had begun to develop the facts from which it could be determined whether Wheatley's identification was reliable, perhaps the most significant interjection on the part of the trial judge occurred:

Q. (By the prosecutor) Then you went into your girl friend's house, stayed twenty or thirty minutes and then when you came out you saw the defendant whom you now recognize. You didn't know him at the time.

A. No, sir, I did not.

Q. And you haven't seen him for the past twenty months until very recently.

A. That's correct.

Q. I believe you told us very candidly you just met him during your recent incarceration.

A. Yes, sir. I noticed him, you know. He is housed in the same section of the jail.

The Court: How much of a look at him did you get that day when you saw him being arrested?

The Witness: Pretty good. I stopped and signified.

The Court: Did you stop and watch what was happening?

The Witness: Yes, ma'am. Him being arrested. I stopped and watched.

The Court: What all did you see?

The Witness: The average arrest procedures.

The Court: Tell us.

The Witness: His hands being cuffed behind his back and put into the—into the, you know, truck like thing.

The Court: Did you see anybody else there besides police?

The Witness: No, just police, ma'am. Just police.

Q. (By prosecutor) You don't recall seeing a number of ladies of all ranges in age relatively old to quite young?

A. No, sir. I couldn't actually say.

The Court: How was he dressed?

The Witness: I can't remember as a matter of fact, ma'am, his exact clothing.

The Court: Well, the next time you saw him was twenty months later?

The Witness: Yes, ma'am. About.

The Court: But you remembered his face?

The witness: Yes, ma'am, I did. As a matter of fact, the shape of his head I remember.

While it is true that we do not have the benefit of having heard and seen the witnesses testify live, several things are obvious from the examination of Wheatley by the trial judge. First, the trial judge did not wait for the advocates to do their job before plunging in and asking questions. Second, the questions the trial judge asked were those affecting the credibility of the witness. Third, and most important, given the nature of the questions the trial judge asked and the context in which they were asked, "the jury could not have failed to understand, that the trial judge did not believe the story [the witness] was telling. . . ."

As I read the transcript, it is clear that the trial judge was not an impartial arbitrator, but an advocate for the State.

The majority acknowledges that some of the trial judge's interventions were "wholly unnecessary and served only to provoke an argument with defense counsel", that "the court should certainly have exercised greater restraint", and further, that this Court has previously admonished the trial judge for past indiscretions of this kind. *See McMillian v. State*, 65 Md.App. 21, 499 A.2d 192 (1985). Nevertheless, the majority holds that the judge's interruptions and comments were not tantamount to reversible error. It observes in passing that many of the *sua sponte* interjections and comments were not "immediately objected to",[11] which seems to suggest that had there been objections, the result might have been different. I can

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[11] Appellant's counsel did object on one occasion to the court's interruptions and moved for mistrial. In the colloquy that followed, the trial judge declared: "I only interrupt when the questions are improper."

concur with the majority only insofar as it acknowledges error on the part of the trial court. As indicated, I consider the error to mandate reversal. In that regard, I call to the majority's attention the case of *Elmer v. State*, 239 Md. 1, 9, 209 A.2d 776 (1965) in which the Court of Appeals, commenting upon the trial judge's declaration, in front of a jury, that a witness was hostile, held:

> We think under the unusual circumstances here presented and the unquestionably harmful effects of the judge's remarks in the presence of the jury as we point out in more detail below, the accused was not afforded a fair and impartial trial and he was, therefore, denied due process of law, which, under the authorities cited above, would call for our review of the propriety of the court's remarks, even if no objection had been made thereto.

The authorities cited by the Court included *Bryant v. State*, 207 Md. 565, 115 A.2d 502 (1955); *Wolfe v. State*, 218 Md. 449, 146 A.2d 856 (1958) and *Rowe v. State*, 234 Md. 295, 199 A.2d 785 (1964).

In *Bryant*, although holding that the record did not show that the trial judge's actions deprived the accused of a fair and impartial trial, the Court commented that: "[t]he degree of severity of the trial judge's rebukes of an attorney, when the occasions require them, is left to the discretion of a judge 'as long as they do not prevent a fair and impartial trial' ". 207 Md. at 585, 115 A.2d 502. Similarly in *Wolfe*, in which a trial judge, attempting to assist an unrepresented defendant, made prejudicial remarks in the presence of the jury, the Court of Appeals, on its own motion, took "cognizance of and correct[ed] the . . . error even though such error may not have been properly includable in the assignment of errors. . . ." 218 Md. at 455, 146 A.2d 856. The Court reiterated the general rule, however, that generally an issue may not be raised on appeal unless preserved by appropriate objection. Rather

than improper remarks by the trial judge, *Rowe* involved, the effect of the court's failure to instruct the jury as to a finding of insanity. Even though no assignment of error was made as to that issue, the Court stated, "we think we must, under the unusual circumstances of this case, take cognizance of the plain error *sua sponte*." 234 Md. at 302, 199 A.2d 785.

I also remind the majority that at issue here is whether we should exercise our discretion to review an issue which was not raised and decided below. Maryland Rule 1085 contemplates that an appellate court "will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court." Its prohibition, however, is not absolute, as evidenced by the "use of the adverb 'ordinarily' [which] implies that there may be extraordinary circumstances in which review will be granted despite the lack of a ruling at the trial level." *Smith v. State*, 64 Md.App. 625, 632, 498 A.2d 284 (1985). As this Court observed in *Smith*, "In the final analysis, the question of whether to review an issue not raised and decided below is discretionary with the appellate court." 64 Md.App. at 632, 498 A.2d 284, citing *Booth v. State*, 62 Md.App. 26, 38, 488 A.2d 195 (1985). Moreover, like the exercise of discretion to notice plain error, ". . .this discretion should be exercised in favor of review when the 'unobjected to error [is] compelling. extraordinary, exceptional or fundamental to assure the defendant a fair trial' ". 64 Md.App. at 32, 498 A.2d 284, quoting *State v. Hutchinson*, 287 Md. 198, 203, 411 A.2d 1035 (1980). It cannot be gainsaid that the error in this case easily meets each of those criteria.

Thus, it is plain that "when the trial result[s] in a denial of due process", *Elmer*, 239 Md. at 8, 209 A.2d 776, the Court should review the propriety of the actions of the trial court *sua sponte* or, at the very least, at the suggestion of appellant, even if that suggestion is presented for the first time on appeal.

To the majority's suggestion that under these circumstances, simply an admonition is sufficient, the following should be noted. An admonition has not worked in the case of this trial judge in the past and, furthermore, an admonition will not ameliorate the adverse effects suffered by appellant as the result of the trial judge's actions. It is my view that the failure to take definitive action in this case effects a travesty of justice and undermines the very principles of due process contained in the federal and Maryland Constitutions.

Because the trial judge's interjections in the trial denied appellant a fair trial and due process of law, I would reverse appellant's convictions and remand the case for a new trial. Moreover, I would instruct that the new trial be conducted before another judge.

I also have a problem with the majority's resolution of appellant's double jeopardy/collateral estoppel issues. I agree with appellant's "simple and direct" position: "[T]he use of a deadly weapon is a necessary element for conviction under Article 27, Section 488. Here the Appellant was found not guilty of the use of the handgun in the third trial. The only State theory of the case was that a handgun was involved." Although appellant admittedly did not provide us with a transcript of the third trial, that appellant's premise is correct is obvious and is not seriously contested. Mere conjecture, which is the only stuff of which the State's position is made, does not suffice to sustain the majority's holding. This is particularly so where, as here, neither the State nor the trial judge, during the argument on appellant's motion to dismiss, disputed, or even suggested, that the State's theory of the case was that appellant acted in concert with someone else, or that the evidence tended to prove such a theory. All the State posits is, as the majority acknowledges, the conjecture that "the third jury may have concluded that appellant was not the actual robber (or wielder of the handgun) but may have entertained some feeling, short of unanimity, that he

was an accomplice of or receiver for the actual robber, who escaped."

I also have difficulty with the majority's position with regard to the election of a jury trial issue. At the conclusion of the colloquy with the court concerning his election, appellant specifically stated, in what I consider to be unambiguous terms, that "I am not praying no jury trial." The court did not respond to that statement or conduct any inquiry with respect to it. I think that, at the very least, there should have been some inquiry made by the trial court to ensure that appellant's election was freely and voluntarily made. Since that was not done, I believe that the case should be reversed for that reason as well.

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

No. 89-1425

STATE OF MARYLAND,

Petitioner

v.

AVERY V. FERRELL

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, Avery V. Ferrell, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached brief in opposition to petition for writ of certiorari without pre-payment of costs and to proceed in forma pauperis pursuant to Rule 46.

The Petitioner's supporting affidavit is not attached because despite reasonable efforts of counsel to to locate Respondent's in sufficient time to secure his affidavit, counsel has been unable to do so. Petitioner has filed the attached brief in opposition and motion to proceed in forma pauperis without benefit of the supporting affidavit in order to comply with this court's order that a response be filed in the above captioned case by June 7, 1990.

Accordingly, we respectfully pray that this Court let the Respondent proceed in forma pauperis without pre-payment of costs or fees or the necessity of giving security therefore.

_____
JUSTICE

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ISSUE PRESENTED

Where the State has consolidated all charges in a single presecution and the jury acquits on one charge, but is unable to agree on another charge sharing a common issue of ultimate fact, do the principles of collateral estoppel embodied in the Fifth Amendment's Double Jeopardy Clause bar retrial of the undecided charge?

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RESPONDENT'S BRIEF

The Respondent, by his attorneys, George E. Burns, Jr., and Jose' Felipe' Anderson, Assistant Public Defenders, requests that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

The underlying factual question in this case is simply whether Respondent was the perpetrator of an armed robbery. The procedural history of the State's attempt to prove that Respondent was the robber was clearly explained by the Court of Appeals:

The State's Attorney filed four criminal informations against Ferrell, each relating to one of the victims, and each charging the following offenses:

Count 1 - Robbery with a deadly weapon;
Count 2 - Attempted robbery with a deadly weapon;
Count 3 - Robbery;
Count 4 - Assault with intent to rob;
Count 5 - Assault
Count 6 - Theft of less than $300;
Count 7 - Use of a handgun in the commission of a felony or crime of violence;
Count 8 - Unlawful carrying of a handgun.

A fifth information charged Ferrell with assault with intent to murder one of the victims.

Ferrell has since stood trial four times in the Circuit Court for Baltimore City. At the first trial on the above-described charges, the jury returned a verdict of not guilty of assault with intent to murder and guilty of the other charges except counts 2 and 4.[2] Ferrell moved for new trial, and the motion was granted.[3] The second trial resulted in a hung jury on all charges submitted to the jury. At the third trial, the state desired that only the charges of armed robbery and use of a handgun in the commission of a felony or crime of violence would be submitted to the jury. The jury found Ferrell not guilty of using a handgun in the commission of a felony or crime of violence, but the jury was unable to reach a verdict as to armed robbery. Once again a mistrial was declared.

* * *

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[2] It is not clear from the record what happened to counts 2 and 4.

[3] The new trial was apparently granted on the ground that the jury's verdicts were not unanimous. (App. 3a-4a).

REASONS FOR DENYING THE WRIT

The modern law of collateral estoppel was summarized by this Court in Ashe v. Swenson, 397 U.S. 436 (1970). The Court recently delineated the meaning and scope of Ashe:

> In Ashe v. Swenson, 397 U.S. 436 (1970), we recognized that the Double Jeopardy Clause incorporates the doctrine of collateral estoppel. In that case, a group of masked men had robbed six men playing poker in the basement of a home. The State unsuccessfully prosecuted Ashe for robbing one of the men. Six weeks later, however, the defendant was convicted for the robbery of one of the other players. Applying the doctrine of collateral estoppel which we found implicit in the Double Jeopardy Clause, we reversed Ashe's conviction, holding that his acquittal in the first trial precluded the State from charging him for the second offense. Id., at 445-446. We defined the collateral estoppel doctrine as providing that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." Id., at 443. Ashe's acquittal in the first trial foreclosed the second trial because, in the circumstances of that case, the acquittal verdict could only have meant that the jury was unable to conclude beyond a reasonable doubt that the defendant was one of the bandits. A second prosecution was impermissible because, to have convicted the defendant in the second trial, the second jury had had to have reached a directly contrary conclusion. Dowling v. United States, 493 U.S. ___, 107 L.Ed.2d 708, 717 (1990).

The obvious import of this reasoning is that under the facts of this case if Respondent had been tried and acquitted of the handgun offense he could not have been subsequently

tried for armed robbery. The State does not dispute this conclusion; rather the State argues that the instant case is different because when Respondent was acquitted of the handgun offense, the jury was unable to reach a verdict as to armed robbery.

The State's argument rests on the holding that at a single trial, inconsistent verdicts, no matter how illogical, are not unconstitutional. United States v. Powell, 469 U.S. 57 (1984). This holding is inapplicable to the case at bar. First, this tolerance of the illogical results rests on the unique role of a jury.

> "[O]nce the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes, see McDonald v. Pless, 238 U.S. 2643 (1915); Fed. Rule Evid. 606(b) (stating that jurors are generally incompetent to testify concerning jury deliberations); through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality. (emphasis add d) Id. at 67.

Once the jury has disbanded, these considerations no longer exist. A future jury cannot be privy to the deliberations of the first jury and cannot reconstruct its judgment or deliberations.

Second, inconsistent verdicts at a single trial do not involve the Double Jeopardy Clause.

> The primary goal of barring re-prosecutions after acquittal is to prevent the State from mounting successive prosecutions and thinly wearing down the defend-

ant. Justices of Boston Municipal Court v. Lydon, 466 U.S. 294, 307 (1987).

See also Powell, supra at 64.

The difference between a single trial and multiple trial is well-illustrated by this Court's decision in Sealfon v. United States, 332 U.S. 575 (1948). Two indictments were returned against Sealfon; one for conspiracy and the other for the substantive offense. The conspiracy charge was tried first and Sealfon was acquitted. Sealfon was then tried for the substantive offense and convicted. Although, recognizing that "the commission of the substantive offense and a conspiracy to commit are separate and district offenses" and that "with some exceptions one may be prosecuted for both," this Court held that the conviction violated the Double Jeopardy Clause. Id. at 579-580. The reason is that once there is a final litigation as to an issue, that issue may not be relitigated in a subsequent trial no matter what would have been constitutionally permissible at the first trial.[1]

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[1] The State's position is unpinned by a erroneous conclusion. At a single trial it is not unconstitutional for there to be inconsistent verdicts. However, the State has no right to have inconsistent verdicts. Thus, a state court may choose not to permit such verdicts, may mandate that trial judges instruct juries not to render them and may limit them to non-jury trials. See Shell v. State, 307 Md. 46, 512 A.2d 358 (1986).

> We tolerate inconsistencies in unified jury verdicts in criminal cases, not because of any singular virtue we attribute to inconsistency, but rather out of deference to the nature of the jury and the role it plays in own jurisprudence. (App. 20a), (quoting United States v.

An inherent problem in the State's position is defining the status of a mistrial. "[U]nder Maryland common law a mistrial is equivalent to no trial at all..." Thus, it "is not a final determination, and resolves no issue...." (App. 7a). Under this analysis, the only "judgment" was the acquittal, thus making the case indistinguishable from a case where the armed robbery was not tried. The status of a mistrial under Maryland law is not a federal question and may not become one so long as it does prove a "double jeopardy violation". See Ludwig v. Massachusetts, 427 U.S. 628, 631 (1976).

Moreover, it is difficult to see how a mistrial can have any other status. The State has not suggested how some other status may be accorded a mistrial or how that "status" might effect other litigation involving mistrials. See, e.g., Cook v. State, 281 Md. 665, 671, 381 A.2d 671, cert. denied, 439 U.S. 839 (1978). The focus in applying collateral estoppel can only be in final judgments. Here the jury acquitted Respondent of the handgun charge and refused to convict him of armed robbery. This Court has recognized as much.

> Nor was the jury's conviction of respondent on the charge of incest an implied acquittal of the offense of sexual assault, there would have been an implied acquittal only if the jury had been pre-

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Mespowlede, 597 F.2d 329 (2nd Cir. 1979)

There is no good reason to accept the State's suggestion and to change a blemish on the criminal justice system to a major disfigurement of the system.

> sented with charges of both sexual assault and incest and had chosen to convict respondent of incest. Montana v. Hall, 481 U.S. 400, 403 n.1 (1987).

The crucial point in this case is that the State had its opportunity to prove that Respondent was guilty of both armed robbery and the handgun offense. The State failed to convince the jury and its failure is not a reason to abort the ordinary rules of collateral estoppel. The petition should be denied.

Respectfully submitted,

Alan H. Murrell
Public Defender

George E. Burns, Jr.,
Jose' Felipe' Anderson
Assistant Public Defenders

Counsel for Respondent